Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-358

FARRELL LINES INCORPORATED,
Petitioner,

against

ANTHONY CANIZZO, UNIVERSAL TERMINAL AND STEVEDORING CORP., and FRANK J. HOLLERAN, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner,

against

ANTHONY CANIZZO, UNIVERSAL TERMINAL AND STEVEDORING CORP., and FRANK J. HOLLERAN, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Farrell Lines Incorporated, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit decided June 2, 1978.

Opinions Below

The Opinion of the Court of Appeals in Farrell Lines Incorporated v. Anthony Canizzo, Universal Terminal and Stevedoring Corp., and Frank J. Holleran, Inc., is not yet officially reported and appears in the Appendix. The Opinion of the United States District Court for the Southern District of New York is not officially reported and appears in the Appendix.

Jurisdiction

The Decision of the United States Court of Appeals for the Second Circuit was entered on June 2, 1978. The decision affirmed a finding by the District Court of vessel liability and reversed and remanded for a redetermination of damages. A stay of the mandate was granted on July 6, 1978 on consent of all parties pending the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction in the District Court was invoked by virtue of 28 U.S.C. 1333 and the case was tried without a jury pursuant to F.R. Civ. P. 38(e).

Questions Presented for Review

1. Under the 1972 Amendment to 33 U.S.C. 905(b), can a vessel owner be found liable for injuries to a longshoreman caused by an unsafe condition which the vessel owner could assume would be remedied by the independent contractor even though a crew member may have acquired knowledge of it?

2. Is a finding which imputes liability to a vessel owner based on the probability that a crew member should have seen a potentially unsafe condition, which could have been remedied by the independent contractor, clearly erroneous?

3. Was the dismissal of the indemnity and contribution claims against the contractors in this case clearly erroneous?

Statutory Provisions Involved

UNITED STATES CODE; TITLE 33 § 905(b).

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages

by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. As amended Oct. 27, 1972, Pub.L. 92-576, § 18(a), 86 Stat. 1263.

§ 941(a)

Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees. However, the Secretary may not make determinations by regulation or order under this section as to matters within the scope of title 52 of the Revised Statutes and Acts supplementary or amendatory thereto, the Act of June 15, 1917 (ch. 30, 40 Stat. 220), as amended or section 1333(e) of Title 43.

Statement of the Case

On January 12, 1973, petitioner's vessel the SS AFRICAN COMET, was berthed at Pier 5, Port Authority, Brooklyn, New York. The vessel was loading cargo. Respondent Universal, an expert independent contract stevedore, was employed by Farrell to load various hatches of the vessel. Respondent Holleran, an expert independent lashing and carpentry contractor, was employed by Farrell to provide separate lashing and carpentry gangs to secure and lash the cargo loaded by Universal. Both Universal and Holleran provided their own employees, foremen and equipment to perform their respective work. Canizzo was employed by Holleran in one of the carpentry gangs.

The loading commenced at approximately 8:00 A.M. on that day. Respondent Canizzo was working in various hatches between 8:00 and 5:00 P.M. Between 1:00 and 1:30 P.M. locomotives were loaded by Universal on the inshore and offshore sides of the No. 6 hatch. The stevedores left a walkway *on either side* of the locomotives. There were no potentially unsafe conditions in either area prior to the time when the locomotives were loaded and in fact immediately afterwards. A lasher employed by Holleran claims that he observed an area of grease, with wires on top of it, in the walkway adjacent to the inshore locomotive after 1:30 P.M.

At 5:15 P.M. Canizzo was traversing the area between the locomotive and the inshore hatch coaming. As he walked between the two, he stated "after I took a few steps I slid and I stumbled and I tried to get my balance, I couldn't, and I fell over on my hands and knees, hurting my right hand and my left leg." After the accident he observed grease on his overalls and that "there were a few wires there with grease on them and cluster lights with the wire hanging, you know, all messed up."

At the time of this alleged accident, the contractors were performing loading and securing work in the hatch and on the locomotive. Their employees were working in the area all day.

There was no testimony that the vessel's crew placed cluster lights in that area or had anything to do with the grease, although an inference was drawn by the District Court from conflicting and speculative testimony that a member of the crew placed the cluster lights there.

The District Court found the vessel negligent because the crew member, by placing the cluster lights in the area on top of other wires and grease, contributed to the potentially unsafe condition. It also found that the unidentified crew member who placed the cluster lights should have seen the grease. The basis of the finding of vessel's liability was Restatement of Torts (Second) 343-343A. (37a)

William Davis, the superintendent of the stevedores, and Jack Holleran, the owner/president of Holleran, both testified that if any debris or grease accumulated in their working area their men would clean it up. Davis indicated that his men kept the walkway clear. In fact, he was there as late as 4:30 in the afternoon during that day and made sure that the walkway was clear. If grease had accumulated on the site of the accident, the responsibility for removing it or warning workers about it rested primarily on these independent contractors who had assumed this function. As indicated in the dissent filed by Judge Friendly, the ship "would therefore certainly not have been negligent if it merely failed to discover the existence of the grease within the hours this assertedly accumulated."

Under traditional principles, namely the contractors' warranty to perform their work in a workmanlike fashion, and compliance with safety and health regulations for longshoring, 29 C.F.R. 1918.19(c), requiring slippery conditions to be eliminated as they occur, the responsibility for this

potentially unsafe condition remained with the contractors. Thus, even if we accept the lower Court's finding that an unidentified crew member should have seen the grease, there was no reason to think, as noted by Judge Friendly, that the independent contractors, who were primarily responsible for the safety of their workers, would not take care of the problem as they were bound to do. Certainly, at the very least, the vessel's indemnity and contribution claim against the contractors should have been sustained. While Holleran was entitled to the 905(b) statutory immunity from suit, the cause of action against it, in the instant case, was based on the fact that it employed both a lashing and a carpentry gang with separate foremen, workers and tools. Because of the negligence of the lashers, which resulted in an injury to a carpenter, Holleran could not claim the statutory immunity. The immunity from suit granted to employers under section 905(b) only covers the situation where the negligence of *fellow workers* causes an injury, not every worker engaged in providing a service to the vessel, i.e., those engaged in the same service being provided to the vessel.

The lower Court found Farrell liable and dismissed the cross-claim against co-defendants Universal and third-party defendant Holleran, and found Canizzo 40% contributorily negligent. The net verdict amounted to $65,628.60.

The Court of Appeals, by a divided panel, affirmed the decision on liability and reversed and remanded a portion of the damages to be redetermined by the lower Court. Judge Friendly dissented from the holding as to liability. The decision of this panel was filed three weeks following the decision in *Cox* v. *Flota Mercante Grancolombiana, S.A.* (2d Cir. dec. May 10, 1978, Docket No. 77-7338, petition for writ of certiorari filed October term, 1978, Docket No. 78-72). It was recognized in both the majority and minority *Canizzo* opinions that the decision in *Canizzo* cannot be reconciled with *Cox*.

Reasons for Granting the Writ

I

The decision below conflicts with the decisions of other courts of appeals as to the standard of care to be applied in personal injury suits under 33 U.S.C. 905(b).

The 1972 amendment to the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), dissolved the tripartite litigation between longshoremen, shipowners and stevedore employers. As indicated by Chief Judge Kaufman in *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837 (2d Cir. 1977):

> the worker could recover only for injuries proximately caused by the shipowner's negligence, not unseaworthiness. The stevedore employer no longer could be impleaded and fear of the coercive effects of unequal bargaining power led Congress to prohibit involuntary indemnification accords. Federal Courts were to fashion a uniform law of negligence in future cases based not upon the doctrine of unseaworthiness but by analogy to landbased common law tort principles.

It was the intent of Congress that a uniform standard of care be developed. House Report No. 1441 (Education and Labor Committee) U.S. Code Congressional & Administrative News; 42 Cong. 2d Sess. Page 4698 et. seq. 1972.

With respect to the vessel's liability for injuries caused by "open and obvious conditions," when such a condition can be remedied by the independent contractor, there has been a complete division among the Circuits. The conflict is centered on the application of Sections 343-343A of the Restatement (37a) as the appropriate standard of care. The traditional land-based rule was that no liability attached to

the possessor for "open and obvious conditions." Section 343A, adopting the so-called modern trend, modified that rule.

In *Napoli* v. *TransPacific Carriers Corp.*, 536 F.2d 505 (2d Cir. 1976) the Second Circuit announced Section 343A as the standard of care in cases dealing with injuries to longshoremen under the amended statute. But that decision appeared to be limited in its application to those situations where the stevedore and the vessel owner were one and the same, i.e. where the vessel was the same as the possessor of land without the intervention of an independent contractor. The panel deciding *Lubrano* v. *Royal Netherlands SS Co.*, 572 F.2d 364 (2d Cir. 1978) indicated that it would not so limit *Napoli*. The decision in *Cox* however, limited the application of *Napoli* to a factual setting in which the vessel acts as its own stevedore. The majority in *Cox* indicated that it was following the Fourth Circuit opinions in *Anuszewski* v. *Dynamics Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976) cert. denied, 429 U.S. 1098 (1977) and *Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977) which Judge Friendly cited in his dissent in the instant case. Judge Russell's comments in *Riddle* set forth the Fourth Circuit's open and obvious rule:

> However, even under the modern rule a vessel is not liable for "open and obvious" dangerous conditions, whether existing at time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoremen or shipyard worker.

The Fourth Circuit has rejected the Second Circuit's *Napoli* application of 343A under circumstances similar to those found in *Canizzo* and *Lubrano*. *Chavis* v. *Finnlines Ltd., O/Y* (4th Cir. decided May 22, 1978 Docket No. 77-1126).

The Third Circuit in *Hurst* v. *Triad Shipping Company*, 554 F.2d 1237 (3rd Cir. 1977) at page 1249 N. 35, cert. denied, 46 U.S.L.W. 3218 (1977), has also specifically disapproved the application of 343 and 343A. See also *Brown* v. *Ivarans Rederi A/S*, 545 F.2d 854, at page 863 N.10 (3rd Cir. 1976), cert. denied, 430 U.S. 969 (1977). The Fifth Circuit has followed the application of 343-343A without the limitation suggested in *Cox* and *Riddle* and Judge Friendly's opinion in *Canizzo*. *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977); *Gay* v. *Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977). The Ninth Circuit has also adopted 343-343A. *Teofilovich* v. *D'Amico Mediterranean/Pacific Line*, 415 F.Supp. 732 (C.D.Cal. 1976). Judge VanPelt in *Davison* v. *Pacific Inland Navigation Co. Inc.*, 569 F.2d 507 (9th Cir. 1978) page 508 N.1, has set forth this split among the Circuits with respect to the standard of care to be applied in New Act cases.

There is no indication that there will be a resolution among the Circuits of the question of the appropriate and uniform standard of care directed by Congress to be applied in New Act cases. It appears that the conflict has been crystallized not only between the Circuits, but even among different panels of the Second Circuit.

As analyzed by Judge Friendly, if the responsibility of the contractors with respect to their obligations, both under the safety regulations and the applicable law, had been taken into consideration by the lower Court and by the majority of the panel, the complaint in *Canizzo* would have had to be dismissed. The lower Court only considered the responsibilities as indicated in 343A of Farrell to Canizzo. Congress did not intend to subject the vessel to liability in situations of this kind. The majority opinion suggests,

> We are faced, then with a difficult problem of line drawing which at this stage in the development of

> legal doctrine is best undertaken on a case by case basis. (7a)

The effect of the decision and the further expansion of 343A creates by indirection a non-delegable duty on the part of the vessel owner. This is pointed out clearly by the Third[2] and Fourth Circuits[3] and by the opinion in *Cox*. By applying Section 343A the Court effectively eliminated from consideration the responsibility of the independent contractors who have been entrusted with the primary duty to provide their employees with a safe place to work. 33 U.S.C. 941(b). *Marant* v. *Farrell Lines, Inc.*, 550 F.2d 142 (3d Cir. 1977). More importantly, Section 343A removes the incentive for the contractors to provide their employees with a safe place in which to work and circumvents the Congressional intent.[4]

Thus, the varying conflicts among the Courts of Appeals unresolved to date and which cannot be resolved by future litigation requires a determination by this Court as to the appropriate standard of care to be used in New Act cases.

The importance of such a decision can scarcely be underestimated in light of the great number of cases which are pending wherein longshoremen are seeking to recover damages for personal injuries and in which the verdict will depend on the Circuit in which the longshoreman was injured and/or the shipowner resides.

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[2] *Hurst, supra* at p. 1249 N.35.

[3] *Riddle, supra, Chavis, supra.*

[4] The proper Restatement section as approved by *Hurst* and more recently in *Chavis* is Section 409 of the Restatement of Torts (Second). While the effect of Section 409 was alluded to by the majority (6a) they viewed its application as "too strict a view." Possibly this panel's concept that the workmen's compensation benefits were not adequate under the new scheme was the paramount consideration (9a N.3). This of course is not correct and contrary to the entire legislative history and statutory scheme.

II

The conflict in opinions between different panels of the Second Circuit Court of Appeals requires intervention by this Court and exercise of its supervisory powers.

The decision of the Court of Appeals in *Canizzo* cannot be reconciled with the decision of a different panel rendered three weeks previously in *Cox*. The plaintiff in *Cox* has filed a petition for a writ of certiorari. The majority in the instant case indicates,

> While each case must be determined on its own facts the result in Cox cannot reasonably be reconciled with the result here by the difference in the factual situations. (Footnote 3) (9a-b).

Judge Friendly states:

> While the majority disregards Cox because the opinion was handed down in the face of known disagreement by majority of this panel, our district judges can scarcely be expected to function with so discordant a chorus on this court (17a).

In footnote 7 Judge Friendly notes:

> Indeed the facts in Cox were stronger for the employees (17a).

In *Cox* there was evidence that the vessel had assumed the responsibility to place pins in the hatch beams and had retained control over that particular function. Plaintiff was injured when a hatch beam which allegedly was to be secured by the vessel's chief mate fell on top of him. The panel in *Cox* limited *Napoli* and refused to impute liability to the vessel because of a dangerous condition which the contractor could have remedied.

At the present time the District Judges in the Southern District cannot determine which standard of care is applicable in New Act longshore cases but more importantly, the "differences of opinion and known disagreements" which existed when these decisions were handed down require that this Court entertain its supervisory power and finally resolve this troublesome issue, so that a uniform standard of care can be utilized within this Circuit and the other Circuits.

III

The decision below raises significant and recurring problems concerning the standard of care to be utilized in New Act cases.

It has been indicated that various District Judges in the Southern District of New York have placed longshore actions on a suspense calendar until final resolution of the *Cox-Canizzo* conflict. In actuality the dispute among the various Circuits is exactly the same as can be found in *Cox* and *Canizzo.*

While not every case falls within the penumbra of *Cox* and *Canizzo,* the majority of longshore litigation throughout the country does require a resolution of the question of the applicable standard of care as it relates to "open and obvious conditions." The fact of the matter is that a different legal principle will be applied in the Third and Fourth as opposed to the Second, Fifth and the Ninth Circuits. Even more disconcerting is that the possibility that a verdict appealed to the Second Circuit would be decided based on the panel designated to review it as has happened with the two cases at hand. A vast amount of resources will be needlessly expended both in trial Judge time, lawyers' time and expenses, in cases in which the sole reason for litigation is the confusion as to the appropriate *standard of care.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 346, 488—September Term, 1977.

(Argued December 8, 1977 Decided June 2, 1978.)

Docket Nos. 77-7292, 77-7332

ANTHONY CANIZZO,

Plaintiff-Appellee and Cross-Appellant,

v.

FARRELL LINES, INC.,

Defendant-Appellant and Cross-Appellee,

and

UNIVERSAL TERMINAL AND STEVEDORING CORP.,

Defendant-Appellee and Third Party Plaintiff,

FARRELL LINES, INC.,

Third Party Plaintiff-Appellant,

v.

FRANK J. HOLLERAN, INC.,

Third Party Defendant-Appellee.

(63408)

Before:

FRIENDLY, SMITH and MESKILL,

Circuit Judges.

Appeal from money judgment for personal injuries to longshoreman against shipowner in the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge.*

Affirmed in part, reversed in part and remanded for further proceedings.

JEFFREY V. BOXER (Lilly, Sullivan & Purcell, New York, N.Y.), *for Farrell Lines, Inc.*

RICHARD J. CARDALI (Cohen & Cardali, New York, N.Y.), *for Anthony Canizzo.*

ALBERT S. COMMETTE (Commette, Quencer & Annunziato, New York, N.Y., Robert K. Marzik, of counsel), *for Universal Terminal and Stevedoring Corp.*

JOHN T. SHEAN, New York, N.Y. (J. Robert Morris, New York, N.Y., of counsel), *for Frank J. Holleran, Inc.*

SMITH, *Circuit Judge:*

Farrell Lines, Inc. ("Farrell") appeals from a decision and order of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* finding Farrell liable for injuries sustained by appellee Anthony Canizzo in an accident on board Farrell's ship, the S.S. African Comet. The court found Farrell liable for damages in the net amount of $65,628.60, after a deduction which included $8500 per year for remaining earning ability and 40% contributory negligence, and Canizzo cross-appeals from this reduction in the damage award.

For the reasons adduced below, we affirm in part and reverse in part the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I.

This suit commenced with the filing of a complaint against Farrell and Universal Terminal and Stevedoring Corp. ("Universal"), an independent stevedore loading cargo on board the African Comet on the day of the accident. Farrell impleaded Frank J. Holleran, Inc., Canizzo's employer, as a third-party defendant, and filed a cross-claim against Universal. Universal then filed a cross-claim against Holleran. The district court dismissed Canizzo's action against Universal, Farrell's cross-claim against Universal, Farrell's third party complaint against Holleran and Universal's cross-claim against Holleran.

On January 12, 1973, the day of the accident, Universal was employed by Farrell to load the African Comet. Holleran provided lashing and carpentry personnel to secure the cargo after it was loaded by Universal. Canizzo worked for Holleran as a carpenter. At approximately 5:00 p.m. Canizzo was instructed to move from one part of the ship to another in order to continue his work. In so doing, he was forced to traverse a narrow passageway between a locomotive stowed on the inshore area of the deck and a nearby hatch coaming. While walking through this passageway, Canizzo slipped on a patch of grease which was partially covered by a pile of wires which lay on the deck. Canizzo sustained permanent injury to his knee, and as a result, is unable to work as a marine carpenter or longshoreman. He is not, however, totally disabled.

The trial court found that the ship's crew placed cluster lights and their attached electrical wires in the passageway in question after 4:00 or 4:30 p.m., but at least one-half an hour before Canizzo's accident. The lights, wires, and other clutter which lay on top of the greasy deck created an "obviously dangerous" condition which would have been obvious to any prudent person. The court found that Farrell had actual or constructive notice of this condition inasmuch as the ship's personnel should have seen the grease on the deck when they put out the cluster lights. Furthermore, the crew should have anticipated that Canizzo would be unable to avoid the dangerous condition on the deck. This, the district court believed, was sufficient to bring Farrell within the negligence standard of § 343A of the Restatement (Second) of Torts (1965),[1] which was adopted in this court's opinion in *Napoli* v. *Trans Pacific Carriers Corp.*, 536 F.2d 505 (2d Cir. 1976).

The court found further, however, that Canizzo had been contributorily negligent in failing to walk with sufficient caution, or alternatively, in failing to avoid the wires by taking a different route to the No. 6 hatch. It was further held that Canizzo's damages were reduced, inasmuch as he was capable of earning $8500 per year. Accordingly, the trial court awarded Canizzo $109,381.00 reduced by reason of contributory negligence to $65,628.60.

II.

This suit is brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33

1 Section 343A provides:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> . . .

U.S.C. § 901 *et seq.*, as amended. Amendments to the Act passed in 1972 increased levels of compensation payable to injured longshoremen, eliminated the doctrine of unseaworthiness as it pertained to shipowners, made a shipowner's negligence a necessary condition of his liability, and immunized independent stevedore-employers from liability in excess of compensation payments. In the words of the House Report:

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
>
> . . .
>
> [But] the Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen . . . who are injured while working on those vessels.
>
> . . .
>
> Accordingly . . . it would be fairer to all concerned . . . for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness.
>
> [Report of the House Education and Labor Committee, H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., 1972 U.S. Code Cong. & Ad. News, 4698 at 4702-03.]

See *Lubrano* v. *Royal Netherlands Steamship Co.*, —— F.2d —— slip op. 1533 (2d Cir., Feb. 15, 1978); *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977); *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d

837 (2d Cir. 1977); *Napoli* v. *TransPacific Carriers Corp., supra,* 536 F.2d 505; *Landon* v. *Lief Hoegh & Co.,* 521 F.2d 756 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976).

Under the relevant provisions of the Restatement (Second) of Torts (1965), possessors of land, and hence shipowners, are liable for physical harm caused to invitees by dangerous conditions which are not obvious to the invitee (§ 343), but are absolved from liability when dangerous conditions are known or obvious, except when the possessor should anticipate the harm despite the invitee's knowledge or the obviousness of the condition. (§ 343A.)

Thus in *Napoli, supra,* we held that where a longshoreman had fallen from unsecured planks, there was sufficient evidence of the shipowner's knowledge of "obviously dangerous conditions" that were unlikely to be avoided by the longshoreman, that the case should have gone to a jury for a determination of the shipowner's negligence under § 343A of the Restatement (Second) of Torts. 536 F.2d 505.

A shipowner, however, can only be liable under § 343A if he knows or should have known of the obviously dangerous, but unavoidable, condition. *Ruffino* v. *Scindia Steam Navigation Co., supra,* 559 F.2d at 862; *Munoz* v. *Flota Merchante Grancolombiana, S.A., supra,* 553 F.2d 837.

While these principles are reasonably clear, considerable legal uncertainty remains in cases in which the negligence of a shipowner combines with the negligence of an independent stevedore to cause injury to a longshoreman. Similarly, when harm is caused by an independent stevedore given complete control over the loading of a ship, it is unclear whether, everything being equal, a shipowner is liable for that harm even when he has knowledge of the dangerous condition caused by the stevedore. See Restatement (Second) of Torts, §§ 409-429; *Lubrano* v. *Royal Netherlands Steamship Co., supra,* slip op. 1533 at 1539

(Mocre, *J.*, dissenting); *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka, "Zvir",* —— F.2d ——, slip op. 1459 (2d Cir., Feb. 2, 1978).

Too strict a view of a shipowner's liability in these situations would do much to diminish the salutary effects of the 1972 amendments by, in effect, making shipowners liable, once again, on what is akin to an unseaworthiness standard, but without recourse to contribution on the part of a negligent stevedore. Too lax a view would specifically contradict the congressional intention to make shipowners liable for their own negligence under the amended statute. See Report of the House Education and Labor Committee, H.R. Rep. No. 92-1441, *supra,* at 4701-02. We are faced, then, with a difficult problem of line drawing which, at this stage in the development of the legal doctrine, is best undertaken on a case by case basis.

In the instant case, the trial court found Farrell liable on either of two alternative legal theories. First, it found that the ship's crew placed cluster light wires on top of a patch of grease, thereby creating the dangerous condition which was the proximate cause of Canizzo's injury. Second, it found that, in placing the cluster lights on the deck, the crew observed or should have observed the greasy patch, and was therefore on notice of the obviously unsafe condition aboard ship.

These findings rest on the trial court's assessment of the credibility of plaintiff and of two of plaintiff's witnesses, Mazze and Trovato, both of whom were fellow employees and friends of plaintiff and both of whom had unrelated injury claims pending. The court found both biased in plaintiff's favor and rejected portions of the testimony of each, notably that of Trovato that a ship's officer had observed the dangerous conditions at 1:00 or 2:00 p.m. The court did, however, credit the testimony that the

grease, wire and cluster light wires existed in the area of the accident, that the grease was there at 1:30 or 2:00, and that the cluster lights had been placed on deck by the ship's company.[2]

These conclusions are based primarily on the weighing of testimony by the trier who had the opportunity to observe witnesses Mazze and Trovato on the stand and listen to them under direct and cross-examination, and we find no basis for setting them aside. The existence of a substantial area of grease in a narrow passageway, which should have been known to the ship's personnel, made more dangerous by the positioning by the ship's personnel of the cluster lights and wires upon the greasy area supports the finding of negligence on the part of the ship and justifies the plaintiff's judgment even under the new dispensation.

There is a strong presumption in favor of a trial court's findings of fact if supported by substantial evidence, *Pampillonia* v. *Concord Line, A/S*, 536 F.2d 476 (2d Cir. 1976), *Luigi Serra, Inc.* v. *SS Francesco C*, 379 F.2d 540 (2d Cir. 1967) (maritime negligence). Such findings may be set aside only if clearly erroneous. Rule 52(a), Fed. R. Civ. P. Where no substantial evidence supports a factual determination, it is clearly erroneous, and properly set aside. *United States ex rel. Paxos* v. *Rundle*, 491 F.2d 447, 452 (3d Cir. 1974); *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490, 495 (4th Cir. 1972); *Shenker* v. *United States*, 322 F.2d 622, 624 (2d Cir.), *cert. denied sub nom. American Stevedores, Inc.* v. *Shenker*, 376 U.S. 907 (1963); *Apache Powder Co.* v. *Ashton Co.*, 264 F.2d 417, 422 (9th Cir. 1959); *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F.2d 416, 418 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944); see 5A *Moore's Federal Practice* ¶ 52.03[1]; 9 Wright & Miller, *Federal Practice & Procedure* § 2585 n. 8.

Here the question is not so much whether the evidence supporting the findings on liability is substantial as whether it is credible. We are not convinced that the determination of credibility is clearly erroneous, although a contrary ruling might have been supportable.

The judgment establishing the ship's liability must be affirmed.[3]

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2 While the testimony concerning the cluster lights is to some degree vague and inconsistent, there is some substantial basis for the court to conclude that it was more probable than not that the crew put them out. The longshoremen had often worked this ship and were familiar with its lighting. Trovato testified that "they" put two lights near every hatch and that the ship owns the cluster lights, Canizzo that the crew takes care of them, Dennen (a Farrell witness by deposition) testified that they are owned by the ship, are ship's gear, are stowed adjacent to the hatch, are made available and are available to where they are needed. Holleran indicated hat they were ship's gear but usually hooked up by longshoremen. Davis, a ship superintendent for Universal, by deposition testified that the crew puts the cluster lights out and brings them to the hatch but that either the crew or Universal's men plug them in. There is no indication that the cluster lights in question had yet been hooked up.

3 *Cox* v. *Flota Mercante Grancolombiana, S.A.* was decided May 10, 1978, slip op. 2989ff, while this case was sub judice. *Cox* seems to us in conflict with at least *Lubrano* v. *Royal Netherlands S.S. Co.*, —— F.2d ——, slip op. 1533 (2d Cir. Feb. 15, 1978), among the decisions in this circuit.

While each case must be determined on its own facts, the result in *Cox* cannot reasonably be reconciled with our result here by the differences in the factual situations, for the proof of ship's negligence in *Cox* was at least comparable to that here. With all respect, however, we must disagree with the result in *Cox*. It appears to us to do what the Congress was unwilling to do, abolish the shipowner's liability to the injured longshoreman in negligence as well as in unseaworthiness. As Judge Friendly points out, liability of the ship for such negligence as a greasy deck attributable to the ship's company was specifically contemplated and thought to be preserved by the legislation.

Litigation in this troubled field would be tidier if the Congress had eliminated altogether the ship's possible liability to longshoremen. There are, however, other considerations.

Benefits under the Longshoremen's and Harbor Workers' Act have been considerably increased. We cannot overlook the fact, however, that as is usual under workmen's compensation schemes, they do not fully compensate for the loss suffered. If the ship, not a party to the em-

III.

The trial court found that because of Canizzo's experience as a carpenter and his above-average intelligence, he was capable of earning $8500 per year. While we do not quarrel with the court's estimation of Canizzo's intelligence, we are forced to conclude that it has taken an unfounded view of the employment potential of a 58-year-old, partially-disabled marine carpenter who has a history of heart trouble. While Canizzo may be capable of some employment, the record lacks any evidence as to its nature, availability or rate of compensation. The finding that he can earn $8500 per year until his retirement leaves this court "with the definite and firm conviction that a mistake has been committed" and that this finding is consequently clearly erroneous. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Schley* v. *CIR*, 375 F.2d 747, 749-50 (2d Cir. 1967); Rule 52(a), Fed. R. Civ. P.

Accordingly, we must remand this case for redetermination of Canizzo's damages.

The court's dismissal of charges against Universal for failure of proof of Universal's negligence, and its dismissal of charges against Holleran, as forbidden by the terms of 33 U.S.C. § 901 *et seq.*, as amended, were correct.

The judgment of the district court is affirmed on the issue of liability, reversed on the issue of damages, and the case is remanded for further proceedings consistent with this opinion.

ployment contract, is absolved from liability for its own negligence, this uncompensated loss, which may be very great, is shifted from the negligent ship to the often innocent employee. The terms of the statute and the legislative history indicate to us that while Congress was willing to shift the burden of injury without fault to an improved compensation system for shore workers (who arguably never should have been classified with seamen anyway) it was not willing so to shift the burden of injury through the fault of the ship. This policy judgment we would leave to the Congress.

FRIENDLY, *Circuit Judge*, dissenting from the holding as to liability:

Courts must be exceedingly careful in defining the contours of the longshoreman's action for negligence against the ship, which was preserved by § 905(b) of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), lest too expansive notions of the ship's duty vitiate Congress' intent to do away with absolute liability for vessels (the "unseaworthiness" doctrine) and make greatly improved compensation benefits the primary remedy for longshoremen and harbor workers. Congress' objective, as is well known, was to curtail the triangular action whereby a longshoreman[1] who had already received compensation benefits from his employer[2] would bring a suit for unseaworthiness against the ship, which in turn would sue the employer. See *Munoz* v. *Flota Merchante Grancolombiana, SA*, 553 F.2d 837, 839-40 (2 Cir. 1977). Much of any recovery by the longshoreman would return to his employer's compensation insurer in satisfaction of its lien; another substantial portion would go to the plaintiff's lawyer and medical experts; and there would be a further transactional cost in the ship's recovery from the employer of its cost of defending against the longshoreman's suit. See, e.g., *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969). Unless the courts keep the longshoreman's negligence action against the ship within proper

1 For simplicity I shall generally use the word "longshoreman" to include all persons covered by the Longshoremen's and Harbor Workers' Compensation Act, and the word "stevedore" to include their employers, although plaintiff Canizzo was a marine carpenter. Cf. 33 U.S.C. § 902 (3) and (4).

2 Before the 1972 amendments these were often inadequate, see *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 839 (2 Cir. 1977).

bounds, the ship's situation will be worse in some respects than before since it will be deprived of its former third party action against the longshoreman's employer. Moreover, the increased compensation payments, which Congress conceived as the usual source of making the longshoreman whole, will absorb a still larger share of his recovery against the ship with consequent attenuation of any benefit to the injured worker. And all this despite the fact that the employer is generally in a far better position than the ship to prevent accidents to its employees. See *Lubrano* v. *Royal Netherlands S.S. Co.*, slip ops. 1533, 1546-47 & n. 7 (2 Cir. Docket No. 77-7211, Feb. 15, 1978) (Moore, *J.*, dissenting). Such a result would contravene the objective of Congress whereby

> . . . adequate workmen's compensation benefits . . . by assuring that the employer bears the cost of unsafe conditions, serves [sic] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 3 U.S. Code, Cong. & Ad. News 4698, 4699 (1972).[3] Nothing in the language of the statute or prior decisions of this court or others can justify imposition of liability on the ship under such circumstances as are presented here.

In retrospect it seems to have been a mistake for courts to give such talismanic significance to §§ 343 and 343A of the Restatement of Torts 2d as has sometimes been done. These sections are awkwardly drafted;[4] the framers had

3 Identical language appears in the Senate Report, No. 92-1125, 92d Cong., 2d Sess. 2 (1972).

4 Section 343A, on which liability is here sought to be predicated, is a statement of when the possessor is *not* liable.

no notion that they would be applied to the tangled situations of ship loading or unloading; and they must be read together with Chapter 15, "Liability of an Employer of an Independent Contractor". In dealing with § 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 amendments. In my view Congress did not mean to subject the ship to liability for every dangerous condition known or knowable to it when it had a right to assume that this would be remedied by the employer, as § 941(a) requires. The typical cases where the ship was to be liable under § 905(b) would be for conditions of which it was or should have been aware but of which the employer was not and could not reasonably be expected to be and for affirmative acts of negligence for which the employer bore no responsibility (e.g., when the crew carelessly operated the ship's machinery used in loading and unloading or when such machinery was defective).[5]

Decisions in other circuits have emphasized the primary responsibility of the employer and the right of the vessel to assume that this will be discharged. The Third Circuit

5 This view does not run counter to the case stated in the House Report:

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.

H.R. Rep. No. 1441, *supra*, 3 U.S. Code Cong. and Ad. News at 4704 (1972). The crucial words are "willfully and negligently" and "in the exercise of reasonable care." Reasonable care does not require the ship to act if it could properly expect that the contractors who were constantly coming and going in the area would do so. See *Anuszewski* v. *Dynamic Mariners Corp., Panama*, 391 F.Supp. 1143, 1149 (D. Md. 1975), *aff'd*, 540 F.2d 757 (4 Cir. 1976), *cert. denied*, 45 U.S. 3571 (1977).

disapproved a jury instruction that "[t]he responsibility for the safety of the longshoreman lies concurrently or jointly with the longshoreman's employer, and with the shipowner." *Marant* v. *Farrell Lines, Inc.*, 550 F.2d 142 (3 Cir. 1977). Later, in *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1250 n.35 (3 Cir.), *cert. denied*, 46 U.S.L.W. 3218 (1977), Judge Hunter noted that

> creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b). Every shipowner has the authority to oversee stevedoring operations. If that authority, without more, suffices to charge the shipowner with a responsibility for detecting unsafe methods of operations and warning the longshoremen about them, then shipowners will be back in their pre-1972 position.

The Fourth Circuit has taken a similar view. It approved a jury instruction that the primary responsibility for the safety of a repairman on a ship rested upon the shipyard and not upon the shipowner. *Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103, 1109 (1977).[6] After noting the

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6 In support of this the court stated in footnote 9:

> See, for instance, *Ramirez* v. *Toko Kaiun K.K.* (N.D. Cal. 1974) 385 F.Supp. 644, 653; *Lucas* v. *"Brinknes" Schiffahrts Ges.* (E.D. Pa. 1974) 379 F.Supp. 759, 768.
>
> In the first case, the Court said:
>
> "The primary responsibility for the safety of a longshoreman lies with the stevedoring company."
>
> In *Lucas*, the Court said:
>
> "* * * It is clear, however, that Congress decided that the primary duty to provide a safe place to work is on the stevedore."
>
> In *Brown* v. *Ivarans Rederi A/S* (3d Cir. 1976) 545 F.2d 854, 860 (U.S. appeal pending), the Court said:

"modern" rule of a landowner's liability set forth in §§ 343 and 343A of Torts Restatement and applied by this court in *Napoli* v. *TransPacific Carriers Corporation*, 536 F.2d 505 (1976), Judge Russell went on to say:

> However, even under the modern rule, a vessel is not liable for "open and obvious" dangerous conditions, whether existing at time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel, *if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoreman or shipyard worker.*

563 F.2d at 1111-12 (emphasis added). One author has written:

> The consistent philosophy of these decisions is that in the ordinary situation shipowners are in no position to learn of unsafe conditions or methods arising during the stevedore's operations; when the shipowners do learn of such dangers, ordinarily the stevedore and his employees will have an equal or greater awareness, so that the danger can be said to be open and obvious; and that the safety of stevedoring and other such operations is the primary and usually the sole responsibility of the stevedore.

Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshore-*

> "* * * However, express language in the statute and the legislative history reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore.
>
> 563 F.2d at 1109 n. 9.

men's and Harbor Workers' Compensation Act, 7 Journ. Maritime Law & Commerce 447, 473 (1976).

No decision of this court requires us to ignore the ship's justifiable reliance on the independent contractors to perform their duty. *Napoli* v. *TransPacific Carriers Corp.*, *supra*, 536 F.2d 505, which the district judge regarded as the *fons et origo* of imposition of broad liability on the ship, did nothing of the kind. Where, as in that case, there is no independent contractor, it *is* part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no "independent contractor" with primary responsibility upon whom the ship may properly rely. As the *Napoli* court rightly said in rejecting the district court's charge in that case.

> a charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" is clearly inappropriate where the shipowner, itself, is the stevedore.

Napoli, *supra* at 508. Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace. The decision of a divided panel in *Lubrano* v. *Royal Netherlands S.S. Co.*, *supra*, slip ops. 1533, is also distinguishable. In that case there was evidence of direct knowledge and participation of a ship's officer who "approved and joined in the direction that the men keep working, although the dunnage was not there." It was not a case where either the ship did not actually know of the danger and merely "should" have known, nor a case where at most the ship knew of the problem but could rely on others to alleviate it—in *Lubrano* the

court found that the ship's officer may have himself ordered the continuance of the dangerous situation.

In contrast this court has repeatedly recognized how far the ship may rely upon the independent contractor to rectify dangerous conditions that arise during loading and unloading. *Munoz* v. *Flota Mercanta Grancolombiana, S.A.*, *supra*, 553 F.2d at 840; *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2 Cir. 1977); *Hickman* v. *Jugoslavenske Linijska Plovidba Rijeka, "ZVIR"*, 570 F.2d 449 (2 Cir. 1978). The last of this line of cases is *Cox* v. *Flota Mercante Grancolombiana*, Docket No. 77-7338, decided May 10, 1978, slip opinions 2989. There a unanimous panel directed dismissal of a complaint on facts which the majority properly concedes, see fn. 3, are indistinguishable from those in the instant case.[7] While the majority disregards *Cox* because the opinion was handed down in the face of known disagreement by a majority of this panel, our district judges can scarcely be expected to function with so discordant a chorus on this court.

The first basis on which the district judge and the majority would hold the vessel liable—knowledge of the accumulation of grease—is plainly untenable. When Farrell Lines engaged Universal to load and Holleran to lash the cargo, it was entitled to assume that they would perform the job in a workmanlike fashion, including compliance with the Safety and Health Regulations for Longshoring, 29 C.F.R. 1918.91(c), which require that "slippery conditions shall be eliminated as they occur," and place responsibility for compliance on stevedores. See 29 C.F.R. §§ 1918.2(a); 1918.3(c); *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F.2d 331, 333 (5 Cir. 1977). If grease had ac-

7 Indeed the facts in *Cox* were stronger for the employee. There was evidence that placing pins in the beams was the ship's responsibility and that a mate had agreed with the hatch boss to supply them.

cumulated on the site of the accident for several hours, the responsibility for removing it or warning workers about it rested primarily on the independent contractors whose employees were regularly on the scene and were or should have been supervised, not on the ship. The ship would therefore certainly not have been negligent if it merely failed to discover the existence of the grease within the hours this assertedly was accumulating. Moreover, even if some unidentified ship personnel might have (or, as the district judge said even less convincingly, "should have") seen the grease when they were "pulling out" cluster lights to help the longshoremen and carpenters—assuming there was sufficient evidence for the judge to conclude that this had occurred, which I seriously doubt—this does not establish negligence on the part of the ship. First, any knowledge of the unknown deckhands about the grease would be imputable to Farrell Lines only if they had a duty to inform Farrell about it, ALI, Restatement of Agency 2d § 272, which they may not have had, see *id.* at § 275 illust. 6, unless, for example, they were ship's officers, for which there was no proof at all. Moreover, even if the ship could be said to have had constructive notice of the condition, there was no reason to think that the independent contractors who were primarily responsible for eliminating or warning about it would not take care of the pro' lem as they were bound to do. This is particularly so since, as the district judge noted, Trovato, a Holleran employee and witness for Canizzo, said he saw the grease at 1:30 P.M. and hence could have reported the condition to his employer for corrective action.

There is likewise no merit in the alternative theory that the ship's deckhands aggravated the danger by placing the cluster lights on top of the grease and this aggravation was a substantial factor in causing Canizzo's injury,

ALI, Restatement of Torts 2d §§ 430, 431. In the first place, there was no sufficient evidence to support this. Even if the testimony were deemed adequate to sustain the conclusion that the lights were brought out by deckhands rather than the longshoremen, there is no evidence that deckhands were responsible for placing them where Canizzo fell. Also, if the deckhands had placed the lights precisely at that spot, there were wires on the deck before the cluster lights were put out and Canizzo made no claim that he would not have fallen except for the lights. In his contemporaneous accident report he made no mention of the cluster lights, saying only that he "tripped over debris (old gear and wire)," and at trial his account of the accident was simply that he noticed grease on his overalls and shoes after his fall and that on the deck "there was a few wires there, with grease on them, and cluster lights with the wire hanging, you know, all messed up." The basic cause of Canizzo's slipping was, of course, the grease; its removal was the primary responsibility of the independent contractors, not of the ship. Beyond this, if the cluster lights in fact aggravated the danger caused by the grease and the wires, Canizzo's employer had the responsibility and the opportunity to place them elsewhere and the ship was entitled to assume that it would.

The judgment should be reversed with instructions to dismiss the complaint.

Opinion of the District Court.

FINDINGS AND CONCLUSIONS

BRIEANT, J.

This action, tried before me without a jury on November 22 and 23, 1976, arises out of a claimed personal injury suffered by plaintiff Anthony Canizzo, a marine carpenter, on January 12, 1973 aboard the S.S. AFRICAN COMET.

Plaintiff was employed by third-party defendant Frank J. Holleran, Inc. ("Holleran"). Defendant Farrell Lines, Incorporated ("Farrell") was the owner of the AFRICAN COMET, and defendant Universal Maritime Service Corp. ("Universal", sued herein as Universal Terminal and Stevedoring Corp.) was the loading stevedore.

The COMET was being loaded at Pier 5, Furman Street, Brooklyn, New York.

This is a so-called "new law" case, regulated by the Longshoremen's and Harbor Workers Compensation Act Amendments of 1972, effective November 26, 1972, 33 U.S.C. § 901, *et seq.*

The complaint was filed January 23, 1973, and seeks damages for personal injuries said to have arisen out of a failure "to give the Plaintiff a safe place to work when Plaintiff was caused to fall as a result of debris, wires and a slippery substance resembling oil, causing Plaintiff to sustain serious, severe, crippling, permanent and progressive personal injuries." (Complaint, ¶ Seventh).

Plaintiff also pleads as a second cause of action that the AFRICAN COMET was unseaworthy. Such a pleading no longer states a claim. See 33 U.S.C. § 905(b), as amended effective November 26, 1972.

Both Farrell and Universal were sued directly by plaintiff. By its amended answer, Farrell denied any negligence and pleaded the affirmative defenses of contributory

negligence; that the danger was open, obvious and well known to plaintiff, and caused by risks assumed by plaintiff at the time he entered upon his employment; that the sole cause was the negligence and carelessness of plaintiff's own employer, its agents, servants and employees; and also raised other defenses not material to our discussion here. Farrell's amended answer also sought contribution among defendants; sought contribution from Holleran as a joint tortfeasor, or alternatively, indemnity, and claimed the benefit as an equitable contribution of the amounts of workmen's compensation benefits paid by Holleran to its employee, plaintiff here. Farrell also sought indemnity on various grounds from Universal.

Universal in its amended answer has asserted a cross-claim against Holleran and Farrell, claiming that any liability arose out of a breach by Farrell of its duty to provide the plaintiff with a safe place to work, and also by reason of the negligence of Holleran in creating a dangerous condition, or by plaintiff's contributory negligence to be imputed to Holleran.

Further detailed recital of the allegations of the various parties in their pleadings is not presently necessary, and they are to be deemed incorporated by reference.

The Accident

Plaintiff, then 55 years of age, and having had more than 35 years experience as a marine carpenter working in the Port of New York, was employed on January 12, 1973 by Holleran. Holleran had been retained to provide carpenters and lashers, working as separate gangs, in connection with loading the AFRICAN COMET.

The COMET was moored starboard side to Pier 5. A General Electric diesel locomotive, one of four being carried by the COMET, had been loaded. This locomotive had been stowed on the weather deck, between hatches Nos. 5 and 6 on the starboard side. The locomotive was placed on top of timbers intended as shoreing, and to distribute its

weight. The timbers had been placed by Holleran's carpenters. Holleran's lashers were engaged in lashing the locomotive to the deck, using chains and possible wires, and were also doing other lashing work in the vicinity of hatches 5 and 6.

Shortly after 5:00 o'clock in the afternoon, while walking on the weather deck in a space, described as an alleyway, next to the locomotive, and while passing from hatch 4 to hatch 5, Canizzo fell.

In his accident report given to his employer Holleran on January 15th, Canizzo gave the hour of the accident as 5:15 p.m., and according to the accident report, stated: "while working on deck, walking between 5 and 6 hatches starboard side, he tripped over debris, old gear and wire, and fell, inj. right arm and left knee." The nature of the injury as described in the accident report is: "contusion of right shoulder, elbow, hand, wrist—contusion of left knee." The first notification to Holleran of this incident occurred January 15, 1973. Mr. Holleran testified that on the following Monday Canizzo told him he had fallen over "old gear and wire."

Plaintiff arrived at the emergency room of the Lutheran Medical Center in Brooklyn at 6:00 p.m. on January 12, 1973. The emergency room report (Ex. A), which lists plaintiff's employer as "Hallorry Lumber Co.," shows "patient statement—while at work tripped on ship deck and injured right shoulder and knee, pier 5 Port Authority on African Comet." The findings on examination were "tenderness over right shoulder, arm, forearm and hand with slight limitation of motion." The impression or diagnosis was "contusion of upper extremity." An X-ray taken on January 12th at Lutheran Medical Center showed no evidence of fractures, dislocation or any other bone or joint abnormalities of the right shoulder, humerus, hand and forearm. There was no X-ray taken of the knee, and no notation made with respect thereto.

A contemporaneous entry in the ship's deck log confirms the occurrence of the fall.

At trial Canizzo testified that while walking through the "alleyway," after he had taken a few steps, "I slid and I stumbled, and I tried to get my balance; I couldn't, and I fell over on my hands and knees, hurting my right hand and my left leg." (Tr. p. 15). He stated that he noticed grease on his overalls and shoes after the fall, and that on the deck "there was a few wires there with grease on them and cluster lights with the wire hanging, you know, all messed up."

The area was not well lighted. Dusk was approaching and the cluster lights had been taken out by ship's personnel in preparation to rigging them for continued cargo work. Other persons had walked through the alleyway in the same manner as Canizzo, and had negotiated the area without injury.

William R. Davis, Universal's ship superintendent, testified that he walked down the alleyway, approximately three feet in width, between the locomotive and the coaming of the No. 6 hatch. He did so at 4:00 or 4:30 P.M., at a time when it had not yet turned dark. He found the passageway clear. Lashers employed by Holleran were working near the locomotive. Davis testified that the crew, rather than Universal puts out the cluster lights when requested by stevedores. I find that the cluster lights were so placed by Farrell's personnel after Davis' visit, but at least half an hour before Canizzo's injury and probably longer.

The Court regards the situation as presenting a clear case of *Napoli* negligence [*Napoli* v. *Trans Pacific Carriers, etc.* (Hellenic Lines), 536 F.2d 505, 507 (2d Cir. 1976)]. Farrell, as owner of the COMET was required to exercise reasonable care to furnish plaintiff with a reasonably safe place to work. The condition on the deck at the point where longshoremen and other harbor workers would be

required to walk between the locomotive and the hatch coaming, as an alternative to taking a longer route around the hatch, was obviously dangerous by reason of the presence of wires, lights and clutter, which covered the deck surface, below which there was grease. It was obvious to any prudent person that the deck condition was such as to require careful walking, or alternatively, taking a different route.

The condition was so open and obvious that it should have been observed. I find that there was prior notice of the condition to the shipowner. In so finding, I am relying in part upon the obviousness of the condition, and in part on testimony to the effect that the cluster lights, which are part of the ship's equipment, and ordinarily rigged under the supervision of the Mate, were a contributing part of the condition. In placing the cluster lights in the alleyway, ship's personnel should have seen the grease.

Within the rule of *Napoli, supra,* the ship should have reasonably anticipated that Canizzo would not be able to avoid the danger, despite its obviousness, and the vessel might reasonably anticipate that he would use the "alleyway" despite its obvious danger, since the only alternative would be to take a longer way around. I find that the shipowner was negligent in not correcting the open and and obvious danger, a portion of which was created by the shipowner's employees.

Plaintiff also was contributorily negligent, in that he proceeded into a cluttered area where grease was likely to be associated with the wires and cluster lights, and failed to walk cautiously, make an observation of the footing, or take a longer route around. That with caution he could have negotiated the obvious danger, appears from the fact others had walked through the "alleyway," immediately prior to Canizzo's injury, and had done so without injury to themselves.

Plaintiff testified that Valentino Trovato was working as a lasher and had come over to help him when he fell, and that Salvatore Mazze, who had been walking behind, also had helped him when he fell.

In his accident report, given prior to the litigation, Canizzo says that he "tripped" over the wires on the deck. At trial he testified that he had stepped over and between the wires, and slipped on the grease which the wires concealed. The Court does not attribute this difference in the account given as representing a tendency on the part of Canizzo to exaggerate, or trim his story, to suit some legal theory. I conclude rather that he regarded the two as one, and that in fact he probably did trip over the wires, his foot landed on a greasy substance and he fell. I am inclined to credit his testimony as truthful to the effect that his right foot slipped after he had stepped into the area where the wires were.

The Court observed Mr. Canizzo's demeanor on the stand. Apart from the natural suspicion which attaches to "grease spot cases" in this Court, there was no basis to regard his testimony as incredible, and I find that he testified truthfully at trial.

Salvatore Mazze testified on plaintiff's behalf and corroborated his testimony generally. He too was a marine carpenter employed by Holleran. He witnessed the accident and saw the grease, wire and cluster lights in the so-called alleyway. He claimed also to have seen rope preventers and guy lines in the area of the cluster lights and the electric wires. This I do not believe. Mazze has been a friend of Canizzo for thirty years. Mazze's credibility is suspect, not only because of his friendship for plaintiff, but because he in turn has an accident case pending in this Court, and, by coincidence, Mr. Canizzo is the eye-witness in Mazze's personal injury claim case. Because of his bias, his testimony is entitled to slight weight.

Valentino Trovato also testified for plaintiff. He too was employed as a lasher by Holleran on the date of the accident. He testified that he saw bundles of wire between the 5 and 6 hatch, and also testified that he saw grease covering a space of five or six feet, occupied by the wire, with the grease underneath the wire. He observed this condition between 1:00 o'clock and 2:00 o'clock. He saw cluster lights of the ship on top and "grease on what he fall down on." (Tr. p. 143).

The locomotive had been loaded at about 1:00 o'clock. Universal loaded lashing gear on deck at hatch No. 5 for Holleran at 2:30 in the afternoon, for use in connection with lashing the locomotive. Trovato testified that the Cargo Mate, or Chief Mate of the vessel observed the conditions at 1:00 or 2:00 o'clock. I do not credit this testimony as truthful. Trovato also was a client of plaintiff's attorneys, and had brought two separate actions in this Court, one of which had been settled, and the other pending. He was biased in plaintiff's favor. However, it makes no difference, since I find the conditions described existed in the so-called alleyway for a long enough period so that the vessel knew or should have known of its existence, within the doctrine set forth in *Napoli, supra,* and part of the condition, with respect to cluster lights was created by the ship's personnel.

I find that Farrell was negligent. Its negligence above described, together with plaintiff's contributory negligence in failing to walk carefully and watch where he was going, were the proximate cause of the injuries.

There was no negligence shown on the part of Universal. There is no evidence that Universal undertook any activity with respect to the cluster lights or the electric wires associated with them, and no evidence that Universal caused the presence of the grease. As to the grease, it is equally likely that the grease was caused by Holleran, as by Universal, or the ship's crew.

The negligence of Holleran in failing to provide its employee with a safe place to work is barred in the first instance by the complete remedy of compensation. Under the statutory amendments, no claim over exists in favor of Farrell Lines against Holleran or Universal. 33 U.S.C. §905(b). No negligence by Holleran's lashers was shown.

The Injuries

At the Lutheran Hospital plaintiff was not treated for his knee. He first saw Dr. Lanier for his knee on April 6, 1973. An orthopedic surgeon with 25 years experience and all of the usual credentials, Dr. Lanier, after taking a case history, took X-rays of all of the injured areas. The X-rays were negative. Dr. Lanier's initial diagnosis was that the injury on the right hand and right shoulder were mild, and did not require any particular therapy, but he believed that the left knee showed signs of a torn medial cartilage. He found plaintiff unable to do a full knee bend, and that there was atrophy of the left thigh and of the left leg indicative of limited use due to pain. The medial cartilege situated between the femur and the tibia is a cushioning mechanism for the knee, generally round in shape and found under the meniscus.

An arthrogram in May of 1973 was negative, but Dr. Lanier reached the conclusion that in spite of the negative X-rays and arthrogram, plaintiff, in view of his vociferous complaints, would probably require surgery for the left knee. Plaintiff was given a left knee brace to rest his knee, and physical therapy, and later, on June 27th, a cast was applied to the knee for the purpose of immobilizing the point of injury.

Plaintiff's continued complaints ultimately led to surgery on September 12, 1973 at Flatbush General Hospital. Dr. Lanier testified that he made "an incision over the left knee carried down to the medial meniscus, which is subjacent. I

noted there was a hypermobility of the anterior portion of the medial meniscus, and that immediately explained to me why the arthrogram was negative . . . because if you don't have a frank tear, that may be one reason why an arthrogram is negative and yet surgery can be effacacious, because of looseness of the anterior attachment, which is a relatively common occurrence in knee problems, and on this basis I removed the medial meniscus."

Dr. Lanier testified that following surgery Mr. Canizzo "did fairly well" and received physiotherapy following the operation.

At the time of trial, Mr. Canizzo continued under Dr. Lanier's care, still claimed to suffer pain in his knee, but had improvement in motion. Dr. Lanier believed that the surgery had the ultimate result of being "satisfactory as regards walking around, having less pain, less swelling, less buckling."

In February 1974 plaintiff was readmitted to Flatbush General Hospital under Dr. Lanier's care for the purpose of a manipulation of his knee to improve motion and pick up additional degrees of flexion. On February 25th he was discharged, still with pain over the scar on the knee, feelings of stiffness and a limp while walking. Dr. Lanier reports weakness of the quadriceps muscle, a problem commonly following knee surgery, and symptoms of damage to the lateral cartilage of the left knee, including abnormal sounds on palpation. Dr. Lanier diagnosed a diseased meniscus, and continued physiotherapy.

Although plaintiff's condition suggests further surgery, Dr. Lanier believes that it would be unwise to engage in such second operation at this time, "only because two operations on the knee are just two traumatic insults to a knee, and the knee just doesn't tolerate that much surgery."

Dr. Lanier testified that the accident was a competent producing cause of the injuries. Dr. Lanier believed that the condition was permanent because three years after the

accident and following the surgery there is still restriction of the left knee, complaints of swelling, intermittent weakness, pain and adventitious sounds. He has prescribed medication, restricted activity, and use of an elastic bandage.

Dr. Lanier suggested that continued annual periods of physiotherapy were needed, and this would cost about $20,000.00 for plaintiff's foreseeable future life. As to this item, I believe the treatments would have no beneficial effect, and decline to find this element of damage.

On the cross-examination of Dr. Lanier, it appeared that the initial diagnosis before the operation had been a ruptured medial meniscus, and that the operation showed that Mr. Canizzo did not in fact have a ruptured medial meniscus, but rather had a "hypermobile medial meniscus" in that the ligaments were loosened from the peripheral attachments.

Dr. Balensweig, a qualified orthopedic surgeon testifying for the defendants, did, on examination of plaintiff, find a slight thickening of the lining of the joint and a trace of fluid on the left knee. He found no instability, but did find crepitus in the left knee cap. He found some arthritis changes in the left knee and the usual post-operative conditions of nerve damage. Dr. Balensweig defined a "hypermobile medial meniscus" as "an assumption of physicians when they don't find anything and they believe that the patient has trouble with the knee". His testimony was illuminating (Tr. p. 342):

> Q. What is it (hypermobile medial meniscus) supposed to define?
>
> A. It's supposed to mean a tear of the attachments of the meniscus to the tibia, making it too loose.
>
> Q. In other words it is a looseness?
>
> A. It's supposed to be a looseness. However, the only time we find tears of the attachments of the meniscus that we can believe is when we have a severe injury to the knee with a tear of the radial collateral ligament, and then the meniscus is ripped loose from its attachment, shifted into the joint, and it is way away from its attachments. "If you get a so-called peripheral tear, which you can get, as it heals it can scar down and become hypermobile. It's a wastebasket term, used in orthopedics to explain your mistake in surgery".

Dr. Balensweig believed, and I find, that the operation to the meniscus was the result of a mistaken diagnosis, and an unnecessary operation. Be that as it may, the operation and its results flow from the accident, since it is foreseeable that a person injuring his knee in a fall may, even with a negative arthrogram, a procedure only about 80% accurate, be diagnosed as in need of surgery and may submit to surgery for a torn meniscus, resulting in a post operative diagnosis of hypermobility, the so-called wastebasket term.

In Dr. Balensweig's words (Tr. p. 245) "so, as I said before, it is a term that has crept into orthopedics to explain the 10 or 15% of so-called normal knees that you operate on, where they have symptoms of a torn cartilage and you find nothing, and you say 'well it must have been hypermobile'." But, Dr. Balensweig himself found that Canizzo had a disability, as a result of excess new bone formation in the infrapatellar tendon, which appeared to him to be a post-operative reaction, and he had a low grade synovitis of the knee. Dr. Balensweig also found that the patient had a "myositis ossificans" type of reaction, post-surgically, in the lower end of the incision, and that he would have difficulty kneeling and squatting for more than very brief periods.

Dr. Balensweig testified, and the Court finds, that Canizzo can drive a car, a fact which he himself admits, and can do work requiring limited amounts of walking and standing with sufficient rest periods.

I conclude and find that as a result of the injury and consequent on the decision to operate on the knee (which was reasonable when made, although hindsight shows the sur-

gery unnecessary), plaintiff has a permanent disabling condition in his knee. Plaintiff is not physically fit to perform the duties of a marine carpenter, which require considerable walking and climbing of ladders 60 feet or longer and walking over and across dunnage and other irregular surfaces. This condition prevents totally his employment as a marine carpenter or longshoreman. However, because he can operate an automobile and can stand and walk for periods of time with intervening rest periods, he is in no sense totally disabled from an economic point of view.

I find that plaintiff was injured by falling much in the manner in which he described, while walking between the hatch coaming and the locomotive on the AFRICAN COMET, that his injuries were due to the presence of a greasy substance, cluster lights, electric wires and possibly lashing wires, on the deck, although the presence of the lashing wires is not shown by a preponderance of credible evidence. I find that the danger was open and obvious, and that the shipowner was negligent in not correcting it, and that the shipowner had actual or constructive notice.

Mitigation of Damages

During the period of more than four years which has elapsed since his injury, plaintiff has not engaged in training for any other job. He stays home, relaxes and watches television. Apparently, he is not planning to seek employment. He takes the attitude that because he is 58 years old, he need not do so. (Tr. p. 24).

Canizzo has a substantial career experience as a marine carpenter. He is a personable individual, whose intelligence appears to be better than average. He has occupied a position of importance in his labor union. Apparently, he intends to retire. Although he had a heart attack in April 1976, unrelated to his injuries here, the Court would expect that Mr. Canizzo could devote himself to some productive work, and believes that parttime sedentary em-

ployment within the City could be found by him, either immediately, or after suitable career counseling.

Under familiar legal principles, it is his duty to mitigate damages by attempting to work, and the Court finds that for purposes of this action, he could earn income, without undue hardship, and even with his history of a heart attack, of at least $8,500.00 per year.

The Court fixes the contributory negligence of Mr. Canizzo in failing to walk carefully and watch where he was going at 40%, and the balance of the negligence is attributable to Farrell, or 60%.

Plaintiff's earning capacity was approximately $16,000.00 per year at the time of the accident. Since then marine carpenters can expect to earn more. He was totally disabled for a period of about 14 months. Thereafter he continued to be permanently disabled from the performance of his job as a marine carpenter, but is able to perform other work. With proper vocational counseling, which he should have sought on his own incentive when advised that his knee would not improve further, I find that plaintiff can earn the sum of $8,500.00 per year hereafter, compared with current marine carpenter's earnings of $19,000.00. His losses and damages are computed as follows:

Salary lost while permanently disabled	$ 18,666.00
Difference in salary between work as marine carpenter and value of sedentary job, for work expectance of approximately nine years, total of $94,500.00 reduced to present value at 6% rate	64,260.00
Medical and related services rendered	6,455.00
Pain and suffering, loss of enjoyment	20,000.00
Gross Total	$109,381.00

The foregoing gross amount is reduced by reason of contributory negligence to the net sum fixed by the Court at $65,628.60.

The foregoing constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 52, F.R.Civ.P.

Settle judgment on five (5) days notice disposing of all claims, cross-claims and third-party actions in accordance with the foregoing.

Dated: New York, New York
April 13, 1977

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June one thousand nine hundred and seventy-eight.

Present: HON. HENRY J. FRIENDLY
HON. J. JOSEPH SMITH
HON. THOMAS J. MESKILL
Circuit Judges,

77-7292
77-7332

ANTHONY CANIZZO,
Plaintiff-Appellee and Cross-Appellant,

v.

FARRELL LINES, INC.,
Defendant-Appellant and Cross-Appellee,

and

UNIVERSAL TERMINAL AND STEVEDORING CORP.,
Defendant-Appellee and Third Party Plaintiff,

FARRELL LINES, INC.,
Third Party Plaintiff-Appellant,

v.

FRANK J. HOLLERAN, INC.,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court, with costs to be taxed against the defendant-appellant and cross-appellee Farrell Lines, Inc. in favor of plaintiff-appellee and cross-appellant Canizzo.

A. Daniel Fusaro,
Clerk

By Arthur Heller
Deputy Clerk

Restatement (Second) of Torts § 343-343A (1965).

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Supreme Court, U. S.
FILED
SEP 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-358

FARRELL LINES INCORPORATED,

Petitioner,

aaginst

ANTHONY CANIZZO, UNIVERSAL TERMINAL AND STEVEDORING CORP., and FRANK J. HOLLERAN, INC.,

Respondents.

BRIEF FOR RESPONDENT ANTHONY CANIZZO IN OPPOSITION

RICHARD J. CARDALI
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IN THE

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OCTOBER TERM, 1978

No. 78-358

FARRELL LINES INCORPORATED,

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ANTHONY CANIZZO, UNIVERSAL TERMINAL AND STEVEDORING CORP., and FRANK J. HOLLERAN, INC.,

Respondents.

BRIEF FOR RESPONDENT ANTHONY CANIZZO IN OPPOSITION

Respondent Canizzo's Argument

A petition for certiorari on the grounds of a conflict of circuits must be based upon real conflict. The *Canizzo* decision is not in conflict with decisions in the Second Circuit nor among the other circuits. The *Canizzo* decision is based on bed rock sound legal principle and consistent with decisions based on comparable factual patterns. Only the *Cox* case is in conflict.

The United States Supreme Court has previously stated that:

> "It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the

application of a principle of law, the writ of Certiorari is dismissed as improvidently granted."

Wisconsin Electric Co. v. *Dumore Co.*, 282 U.S. 813.

The decision in the *Cox* case, which is relied upon by the petitioner Farrell Lines, is the only case out-of-step with the consistent opinions in the Second Circuit and other circuits. In fact, because of the *Cox* anomaly, the plaintiff in *Cox* has pending before the United States Supreme Court a petition for writ of Certiorari. (No. 78-72 October Term).

The Court in *Canizzo* stated that they disagreed with the result in *Cox* (an earlier decision by one month) and that *Cox* is in conflict with prior case law (see footnote 3 of *Canizzo* case) not Canizzo.

Lubrano v. *Royal Netherlands S.S. Co.*, 572 F.2d 364 (2nd Cir. Feb. 15, 1978);
Ruffino v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2nd Cir. 1977);
Napoli v. *Transpacific Carriers Corp.*, 536 F.2d 505 (2nd Cir. 1976);
Landon v. *Leif Hoegh & Co.*, 521 F.2d 756 (2nd Cir. 1975), cert. den. 423 U.S. 1053.

Moreover, cases in the Second Circuit decided after *Cox* and *Canizzo* support the *Canizzo* logic that under the 1972 amendments to the *Longshoremen's and Harbor Workers' Act*, 33 U.S.C. § 901 *et seq.*, a shipowner may be liable for its own negligence and for open and obvious conditions of danger.

Espinoza v. *United States Lines*, #78-7063 Decided Aug. 31, 1978 (see appendix opinion attached).
Lopez v. *A/S D/S Svendborg D/S of 1912* #78-7046 Decided July 24, 1978 (see appendix opinion attached).

Following the opinion of *Canizzo* which was critical of the *Cox* decision and revealed the disagreement between the various judges, the Second Circuit decided *Lopez* v. *A/S D/S Svendborg and D/S of 1912 A/S*, Docket No. 78-7046 (July 24, 1978. The Opinion is not yet officially reported and it is set forth in Respondent's Appendix.

The three-judge panel there was unanimous in its disagreement with the *Cox* decision and characterized the confusion that exists as follows:

> "The recent decision in *Cox* v. *Flota Mercante Grancolombiana, S.A.*, No. 77-7338 (2d Cir. May 10, 1978), reversed a jury verdict in favor of Cox, a longshoreman, against the ship on the ground that it was the stevedore's duty alone as an independent contractor to remedy unsafe conditions. The *Cox* decision was handed down in 'the face of known disagreement by a majority of [the] panel' in *Canizzo, supra,* which *upheld* a jury verdict for a longshoreman against a ship and included a comment on *Cox's* contrary view.[7]
>
> This case also will fall within what seems to be rapidly becoming an overly complex and unpredictable body of law. Because of the different views as to whether an employer's failure to remedy a dangerous condition is a defense to a suit by the longshoreman against a ship for its own negligence, we feel that it may not be amiss to explain why we do not agree that the failure of the stevedore to remove or provide protection against the conditions created by the shipowner relieves the latter of liability for injuries to a longshoreman caused by those conditions." (Respondent's Appendix, pp. 23a-25a).

Shipowner, in *Lopez,* suggested an En Banc hearing to hear argument of the appeal, rather than having it heard by a three-judge panel. The suggestion was denied.

Petitioner refuses to face the position of the Fifth Circuit on concurrent negligence, which is directly contrary

to *Cox*. In *Samuels* v. *Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir., May 26, 1978), the Court upheld the right of a longshoreman to recover in full against the steamship company when both shipowner and stevedore were concurrently negligent. The Court there said at page 889:

> "To permit the employer's negligence to reduce the joint tortfeasor vessel's liability would reduce the award of plaintiff, the one person who is blameless. The innocent victim of concurrent negligence would find that, through some (to him inscrutable) judicial attempt to achieve equity for other parties, he must accept a partial loaf as compensation for the full loaf of joint and several liability."

In *Wiles, Jr.* v. *Delta Steamship Lines, Inc.*, 574 F.2d 1338 (5th Cir., June 15, 1978), the Court of Appeals approved of *Samuels* and held that:

> "(1) a vessel owner may be liable for an open and obvious danger if the invitee-longshoreman is not in a position to fully appreciate the risk or to avoid the danger even if aware of it, and (2) if the vessel owner is found to be negligent, the question of whether the longshoreman was himself negligent must also be considered under application of the admiralty rules of comparative negligence." (P. 1338).

The Court also remanded for further consideration the issues: "—(1) was the vessel owner negligent, and (2) if so, was the plaintiff himself (as distinguished from his employer) also negligent." (P. 1339).

The Ninth Circuit agrees with the Fifth Circuit and the Second Circuit (minus *Cox*) and in *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 9th Cir. 1975, cert. den. 1976, 425 U.S. 944, the Circuit Court held that a longshoreman, who has received injuries caused by the concurrent negligence of his stevedoring employer and the shipowner, can recover the full amount of his damages from the shipowner.

The *Senate Committee report* pertaining to the amendment, in speaking of the example of an oil spill on the deck causing injury, states that to recover the longshoreman must establish—"or 2) the foreign substance had been on the deck for such period of time that it should have been discovered and removed by the vessel in the *exercise of reasonable care* by the vessel under the circumstance". Pp. 10-11. (Emphasis supplied)

The Senate Report also sets forth that the Committee intends that "—an employee injured on board a vessel shall be in no less favorable position vis-a-vis his rights against the vessel as a third party than as an employee who is injured on land—". P. 11.

The Senate Report at Page 2 refers to longshoring as a "high risk occupation". "Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations" (Page 2) and at Page 12 states "—Longshoring remains one of the most hazardous types of occupations".

Thus, the standard of care is reasonable care under the circumstances. Ingrained in our common law of negligence is the concept that the greater the risk the higher the degree of care required of the landowner to its invitees. As is set forth in W. Prosser, Law of Torts, Section 34, at 180, "The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it".

Since Congress itself characterized longshoring as high risk and one of the most hazardous types of occupations, and since shipowner must exercise reasonable care, the degree of the standard of care is necessarily a high one, not limited or narrowed.

There is no basis for shipowner claiming a reduction or lessening of the standard of care on their part. This was not the intent of Congress.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. CARDALI
Counsel for Respondent
Anthony Canizzo

Opinion of the United States Court of Appeals for the Second Circuit Re: *Esteban Lopez v. A/S D/S Svendborg, et al.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 899—September Term, 1977.

(Argued May 25, 1978 Decided July 24, 1978.)

Docket No. 78-7046

ESTEBAN LOPEZ,

Plaintiff-Appellant,

—v—

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge,* and
MEHRTENS* and BLUMENFELD,** *District Judges.*

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* Senior United States District Judge for the Southern District of Florida, sitting by designation.

** Senior United States District Judge for the District of Connecticut, sitting by designation.

Opinion of the United States Court of Appeals for the Second Circuit Re: Esteban Lopez v. A/S D/S Svendborg, et al.

Appeal from directed verdict by United States District Court for the Southern District of New York, Richard Owen, *J.*, in negligence action by longshoreman suing shipowner for personal injuries.

Reversed and remanded.

MORRIS CIZNER, New York, N.Y. (Zimmerman & Zimmerman, New York, N.Y., of counsel), *for Plaintiff-Appellant.*

JAMES M. HAZEN, New York, N.Y. (William P. Kain, Jr., Haight, Gardner, Poor & Havens, New York, N.Y.), *for Defendants-Appellees.*

BLUMENFELD, *District Judge:*

This is another case which calls for the application of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950. The plaintiff is a longshoreman who was accidentally injured while at work discharging cargo in the bottom of a hold on the M/S TREIN MAERSK, a vessel owned by the defendants A/S D/S Svendborg and D/S of 1912 A/S. He brought an action in negligence against the shipowner which was tried for two days before Judge Richard Owen and a jury. After the plaintiff rested, the trial judge granted the defendants' "motion to dismiss" for failure to prove a prima facie case of liability against the defendants. The jury was discharged without reaching a verdict. No findings were made as called for by Rule 41(b), Fed. R. Civ. P. The parties have treated this procedural posture of the case as if the court had granted a defendant's motion for a directed verdict under Rule 50(a). Since this was a trial to a jury, we are of the

Opinion of the United States Court of Appeals for the Second Circuit Re: Esteban Lopez v. A/S D/S Svendborg, et al.

view that it is appropriate to consider the case on that basis.

At issue on this appeal is whether there was evidence of negligence by the defendant shipowner "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. . . ." *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). *See also Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 742-43 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). In making that assessment we "must view the evidence and all inferences most favorably to the party against whom the motion is made," *O'Connor* v. *Pennsylvania R.R. Co.*, 308 F.2d 911, 914 (2d Cir. 1962). "The non-moving party is given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached." *Bigelow* v. *Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974).

I.

There was evidence from which the jury could have found the following facts: the plaintiff, a longshoreman employed by Universal Terminal and Stevedoring Co. as a hold-man, was discharging cargo from the square of the lower hold of Hatch No. 4 of the defendants' vessel on February 28, 1973, when he sustained an accidental injury to his back.

Lopez and the longshore gang of which he was a member had boarded the ship at 8:00 a.m. and were directed

to begin at No. 4 hold, from which the hatch cover had already been removed. Loose cartons on top of the stow, held in place by the coaming, were quickly removed. The cargo below those cartons had been palletized. Even though the cargo may have been properly stowed before making a long voyage to New York from the Orient, it had shifted, apparently because of heavy seas. Not only had it shifted, but the cargo was in a considerably damaged condition. Packages had been damaged and kegs of bolts had broken open. Loose bolts were heavily scattered throughout the remainder of the cargo. Some bolts had sifted down as far as the floor of the hold through spaces created when the cargo shifted. The loose bolts scattered about made the hold a dangerous place for the longshoremen engaged in removing the cargo.

The condition of the stow in hold No. 4 was called to the attention of an officer of the ship and the stevedore's foreman by the hatch boss. Both looked down into the hold and observed it. The hatch boss asked, "What are you going to do with this mess?" In the presence of the ship's officer, he was told, "Keep working, the cargo got to come out of the ship, tell your men to be careful; keep working." Later that morning, after most of the cargo in the square of hold No. 4 had been removed, the plaintiff and a coworker were lifting a case from the floor of the square to a pallet from which it had fallen, when the plaintiff stepped on a loose bolt which caused him to slip and subject the muscles of his back to a sudden and unexpected strain, resulting in the injuries for which he sued.

II.

The reasons Judge Owen gave for his decision to grant the defendants' motion to dismiss the complaint may be extracted from the statements he made during colloquy with counsel. More than one reason was given.

(1) First he considered the conduct of the plaintiff. He focused his attention upon the duty of the plaintiff with respect to the risk of injury.

> "It seems to me absolutely clear on this record, without argument, that there is no jury question here. Longshoremen, since time immemorial have had to work under circumstances where there is litter, there is debris, there are turnbuckles, there are bales of wire, there are pieces of dunnage broken and unbroken, lying about areas in which they are working. And they are expected to cope with this kind of thing lying around the areas in which they are working" Tr. 226.

(2) Second, he considered the conduct of the defendants. Proof of the risk of injury to the plaintiff and of how it had been created did not pose any problem. That was evident from his application of what he conceived to be the law to the facts. Quoting from *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861, 862 (2d Cir. 1977), he said,

> "if you go with this case on the Ruffino test, . . . the law there is, 'Before liability can attach for [an] independently created danger,' which is here arguably heavy seas, 'the owner must have knowledge of its existence and [the] opportunity to alleviate it.' There is no question on this record the jury can find the owner knew of its existence." Tr. 227.

He continued:

> "I just don't see how there was an opportunity here on [*sic*] the owner of the vessel to alleviate this condition, even assuming that you find it to be an independently created danger. . . .
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> ". . . It is certainly reasonable for the vessel to assume that under these circumstances, experienced longshoremen would be able to avoid stepping on a bolt and taking a spill." Tr. 227-28.

By this juxtaposition of comments on the duty of the shipowner and the duty upon the plaintiff it appears that the Judge may have been adopting the harsh rule that contributory negligence is a complete bar to recovery. In admiralty contributory negligence may reduce, but does not bar, recovery for personal injuries. Under the admiralty rule the plaintiff's recovery is reduced in proportion to his own fault. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408-09 (1953). By its adoption of the 1972 Amendments to LHWCA, Congress intended that comparative negligence would apply to longshoremen's actions, and that assumption of risk would not. H.R. Rep. No. 92-1441, 2d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4705.[1] The ruling of the

[1] ". . . [T]he Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable."

court was in error insofar and it was based on a conclusion that the plaintiff was barred from recovery because he was guilty of contributory negligence or had assumed the risk of his injuries. Whether, at all, and if so to what extent, any contributory negligence of the plaintiff should reduce his damages must be left to the jury for its determination.

Having considered whether the plaintiff is entitled to be compensated, we turn next to the question of whether, in view of the fact that the shipowner knew of the dangerous conditions in the hold which existed when it was turned over to the stevedore, the shipowner ought to pay. There was evidence from which the jury could conclude that the defendant was negligent.

III.

In defining the parameters of the case before us we heed the opening phrase of Judge Friendly's dissenting opinion in *Canizzo* v. *Farrell Lines, Inc.*, No. 77-7292, slip op. at 3209 (2d Cir. June 2, 1978):

> "Courts must be exceedingly careful in defining the contours of the longshoreman's actions for negligence against the ship, which was preserved by § 905(b) of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. . . ."

The purposes of Congress in enacting the 1972 Amendments to LHWCA have been so perceptively enlarged

upon in other cases[2] that additional broad analysis here would be redundant.

Two principles are settled. In eliminating the absolute liability of a shipowner for unseaworthiness, the 1972 Amendments to LHWCA, 33 U.S.C. §§ 901-950, Congress intended that a vessel would be liable only for its own failure to use reasonable care, *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837, 840 (2d Cir. 1977), which would be determined in accordance with land-based principles of negligence, *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976). *See Ruffino* v. *Scindia Steam Navigation Co., supra,* 559 F.2d at 862.

As the trial judge correctly decided, there was evidence that the defendant knew of the risk of injury from the loose bolts to anyone working in hold No. 4. He was, nevertheless, persuaded to rule that no jury could properly find that the defendant was negligent. His recorded remarks disclose that he relied expressly upon a dictum in *Ruffino* v. *Scindia Steam Navigation Co., supra,* 559 F.2d at 862: "Before liability can attach for [an] independently created danger, the owner must have knowledge of its existence and [the] opportunity to alleviate it"[3] A fuller reading of *Ruffino* indicates that the "opportunity

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[2] *E.g., Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977); *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837 (2d Cir. 1977).

[3] Immediately after quoting from *Ruffino* he continued:

> "There is no question on this record the jury can find the owner knew of its existence.

(Footnote continued on following page)

to alleviate" phrase is merely a timeliness gloss on the requirement of notice of the dangerous condition, meaning only that the defendant must have notice of it in sufficient time to take action to remedy it. In other words, "The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it." W. Prosser, *Law of Torts,* § 61 at 393 (4th ed. 1971). The cases cited in *Ruffino* do not purport to give any content to "opportunity to alleviate" other than knowledge of the risk in time enough to take protective measures against the risk of injury.

We follow *Napoli* v. *Hellenic Lines, Ltd., supra,* which held that where there was sufficient evidence of knowledge by the shipowner of "obvious dangers which it should reasonably anticipate that the longshoremen would be unable to avoid," the case should have gone to the jury under § 343A of the Restatement (Second) of Torts. 536 F.2d at 509. In pertinent part, § 343A(1) states:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or

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(Footnote continued from preceding page)

> "But where I come up against a wall is the opportunity to alleviate it. I don't see what the shipowner could have been expected to do here in terms of curing this, because until you get down to the bottom of the cargo, you don't know whether you are going to find some bolts lying there, and first you've got to get the cargo out, and then sweep it up.
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> "I just don't see how there was an opportunity here on [*sic*] the owner of the vessel to alleviate this condition. . . ." Tr. 227.

> condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts § 343A(1) (1965).

This deviation from the general rule that reasonable care requires nothing more than a warning of the danger is a recognition that there are cases

> "where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. . . . In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough." W. Prosser, *supra,* § 61 at 394-95, *quoted with approval in Anuszewski* v. *Dynamic Mariners Corp. Panama,* 391 F. Supp. 1143, 1147 (D. Md. 1975), *aff'd,* 540 F.2d 757 (4th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977).

Here, as in *Lubrano* v. *Royal Netherlands Steamship Co.,* No. 77-7211 (2d Cir. Feb. 15, 1978), there was evidence of direct knowledge of the unsafe condition before the injury occurred and that the ship's officer knew that nothing was going to be done to alleviate it. What was said there is squarely applicable, slip op. at 1539: "But if there is again evidence that a ship's officer, after being notified of the open and obvious danger of insufficient dunnage for a slippery cargo, had the men keep working *or joined in the stevedore's decision to do so,* then there would be a jury question." (Emphasis added) In this case the evidence "was enough to allow a jury to conclude

that the ship's officer approved and joined in the direction that the men keep working. . . ." *Id.,* slip op. at 1538. The plaintiff was not instructed as to what he should do about the "mess" but was apparently allowed to use his own judgment. The circumstance that the risk of harm was not recognized until the removal of the cargo was in progress is no basis for failure to take precautionary methods against it after the dangerous condition became known. Indeed, the Restatement (Second) of Torts § 413 requires the employer of an independent contractor to use reasonable care to provide for precautions where the work to be done *should be recognized* "as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken. . . ."[4] Comment d. states:

> "Although the employer at the time he lets the contract has no reason to anticipate that conditions will arise which require special precautions to be taken, if in fact such conditions do arise and he knows or should know of them, he is then required to act

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[4] Restatement (Second) of Torts, § 413 reads:

> "One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
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> (a) fails to provide in the contract that the contractor shall take such precautions, or
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> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

in the manner required by the rule stated in this Section."

The fact that differences frequently arise as to whose duty it is to take precautionary measures in cargo removal operations indicates the applicability of § 413, for as Comment b. explains:

> "This Section is concerned with special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions. The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions."

Under the foregoing principles the jury could have found that the defendant was negligent toward the plaintiff.

IV.

The fact that the stevedore shared in the decision to continue working did not exonerate the shipowner, and there is no reason, as a matter of fundamental tort law, why it should not be held liable in damages for its own negligence. It is well established tort law that "an actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this." *Petition of*

Kinsman Transit Co., 338 F.2d 708, 719 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co.* v. *City of Buffalo*, 380 U.S. 944 (1965). Thus, even if the stevedore was negligent in failing to eliminate the dangerous condition, that would not be a defense for the shipowner. Moreover, in *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 674 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) it was expressly held "that a longshoreman who has been injured by the concurring negligence of his employer stevedore and the vessel owner can recover the total of his damages from the vessel owner." We have also rejected a contention by a shipowner that an injured longshoreman could not recover damages against it unless he proved that the shipowner was solely responsible for his injury, stating:

> "First, the draftsmen of section 5(b), 33 U.S.C. § 905(b), could easily have inserted the word 'sole' so that the clause would have read 'caused by the "sole" negligence of the vessel.' Nothing has been called to our attention to indicate such intention. Second, Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees. Third, the scheme of the Act is to provide workmen's compensation for a longshoreman from his own employer, but with a right to sue the ship for negligence. We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own negligence. Of course, if the negligence was *solely* that of the stevedore, the ship would have been found neither negligent nor liable." *Landon* v. *Lief Hoegh & Co.*, 521 F.2d 756, 763 (2d Cir. 1975) (foot-

note omitted), *cert. denied sub nom. A/S Arcadia* v. *Gulf Insurance Co.*, 423 U.S. 1053 (1976).

After our decision in *Landon*, the court in *Dodge, supra*, 528 F.2d at 672, in taking the view we expressed, quoted with approval from *Santino* v. *Liberian Distance Transports, Inc.*, 405 F. Supp. 34, 35 (W.D. Wash. 1975):

> "'On its face it seems inequitable for a shipowner to be liable to an injured longshoreman for all of the latter's damages if the negligence of the shipowner was not the sole proximate cause of the injuries but rather concurred with the negligence of the stevedore employer. Particularly would this be true if the fault of the stevedore employer were much greater than that of the shipowner. Nevertheless, since the Longshoremen's and Harbor Workers' Act is a creature of Congress, it would in this Court's opinion be better for Congress to effect the elimination of any inequity than to have the various District Courts seek to remove that inequity by means which would unavoidably vary from district to district.
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> "'Permitting a shipowner to plead the negligence of the stevedore as an affirmative defense would not eliminate inequity. *It would simply shift the inequity from shipowner to injured longshoreman. He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against his stevedore employer.*' (emphasis added)."

And, more recently, the Fifth Circuit adhered to the rationale of *Dodge* and *Landon* in upholding a judgment for a longshoreman against a vessel owner for negligence in

a terse and vigorous opinion by Judge Rubin, who considered cases from other circuits with contrary holdings. *Samuels* v. *Empresas Lineas Maritimas Argentinas*, No. 76-2129 (5th Cir. May 26, 1978). The rule that the shipowner cannot use the negligence of the stevedore as a defense to a negligence action against it brought by the injured longshoreman, is strengthened by its corollary that the shipowner cannot assert the stevedore's negligence to defeat the stevedore's right to reimbursement of compensation payments out of any damages the longshoreman may recover. In *Pope & Talbot, Inc.* v. *Hawn, supra*, the Court held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full, noting, 346 U.S. at 412, that "reduction of [the shipowner's] liability at the expense of [the stevedore] would be the substantial equivalent of contribution which we declined to require in the *Halcyon*[5] case." We have recently held that *Pope & Talbot* is still good law. *Landon, supra*, 521 F.2d at 760.

V.

Despite the existence of evidence from which the jury could have found that the condition which constituted the risk of injury to the plaintiff was attributable to the ship alone, the defendant contends that it should not be held liable for his injuries. It argues that it was reasonable as a matter of law for the shipowner to do nothing to remedy the condition because it could rely upon the steve-

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[5] *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

dore to take necessary precautionary measures. A vigorous dissent in *Lubrano, supra,* contended for that view on the ground that the stevedore was an independent contractor to whom control over the premises had been relinquished. Support for that view is also found in Judge Friendly's dissenting opinion in *Canizzo, supra,* slip op. at 3211, where he says:

> "In dealing with § 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 Amendments. In my view Congress did not mean to subject the ship to liability for every dangerous condition known or knowable to it when it had a right to assume that this would be remedied by the employer, as § 941(a) requires." [6]

The recent decision in *Cox* v. *Flota Mercante Grancolombiana,* S.A., No. 77-7338 (2d Cir. May 10, 1978), reversed a jury verdict in favor of Cox, a longshoreman, against the ship on the ground that it was the stevedore's duty alone as an independent contractor to remedy unsafe conditions. The *Cox* decision was handed down "in the face of known disagreement by a majority of [the]

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[6] A different view of Congressional awareness of what it was doing was expressed in *Lubrano*: "The ultimate decision reached by Congress was not made lightly. Instead, the result reflects a delicate balancing by Congress of the interests of the various parties involved. The longshoremen received increased benefits, the shipowners are liable only if negligent, and the stevedore did not face the *Ryan* [*Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956)] secondary suit." *Lubrano* v. *Royal Netherlands,* No. 77-7211, slip op. at 1545-46 (2d Cir. Feb. 15, 1978) (Moore, J., dissenting).

panel" in *Canizzo, supra,* which *upheld* a jury verdict for a longshoreman against a ship and included a comment on *Cox's* contrary view.[7]

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[7] Judge Smith commented, slip op. at 3207-08 n.3:

> "*Cox* v. *Flota Mercante Grancolombiana, S.A.* was decided May 10, 1978, slip op. 2989ff, while this case was sub judice. *Cox* seems to us in conflict with at least *Lubrano* v. *Royal Netherlands S.S. Co.*, —— F.2d ——, slip op. 1533 (2d Cir. Feb. 15, 1978), among the decisions in this circuit.
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> "While each case must be determined on its own facts, the result in *Cox* cannot reasonably be reconciled with our result here by the differences in the factual situations, for the proof of ship's negligence in *Cox* was at least comparable to that here. With all respect, however, we must disagree with the result in *Cox*. It appears to us to do what the Congress was unwilling to do, abolish the shipowner's liability to the injured longshoreman in negligence as well as in unseaworthiness. As Judge Friendly points out, liability of the ship for such negligence as a greasy deck attributable to the ship's company was specifically contemplated and thought to be preserved by the legislation.
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> "Litigation in this troubled field would be tidier if the Congress had eliminated altogether the ship's possible liability to longshoremen. There are, however, other considerations.
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> "Benefits under the Longshoremen's and Harbor Workers' Act have been considerably increased. We cannot overlook the fact, however, that as is usual under workmen's compensation schemes, they do not fully compensate for the loss suffered. If the ship, not a party to the employment contract, is absolved from liability for its own negligence, this uncompensated loss, which may be very great, is shifted from the negligent ship to the often innocent employee. The terms of the

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This case also will fall within what seems to be rapidly becoming an overly complex and unpredictable body of law. Because of the different views as to whether an employer's failure to remedy a dangerous condition is a defense to a suit by the longshoreman against a ship for its own negligence, we feel that it may not be amiss to explain why we do not agree that the failure of the stevedore to remove or provide protection against the conditions created by the shipowner relieves the latter of liability for injuries to a longshoreman caused by those conditions.

To avoid the risk of being misunderstood, we do not say that a shipowner should be held *vicariously* liable for the tortious acts of an independent contractor, or his servants. But the shield against vicarious liability for the negligence of an independent contractor does not also shield the shipowner from liability for its own negligence. Although § 905(b) may be construed to "demonstrate that . . . the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore," *Brown* v. *Ivarans Rederi A/S*, 545 F.2d 854, 860 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); *Ramirez* v. *Toko Kaiun K.K.*, 385 F. Supp. 644, 653 (N.D. Cal.

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statute and the legislative history indicate to us that while Congress was willing to shift the burden of injury without fault to an improved compensation system for shore workers (who arguably never should have been classified with seamen anyway) it was not willing so to shift the burden of injury through the fault of the ship. This policy judgment we would leave to the Congress."

1974), or that "the primary duty to provide a safe place to work is on the stevedore," *Lucas* v. *"Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 768 (E.D. Pa. 1974), neither "major responsibility" nor "primary duty" may be read as "sole responsibility." *See Landon, supra*, 521 F.2d at 762-63.

In rejecting the argument of a shipowner that it should not be held liable unless its negligence was the sole cause of the damages, we noted in *Landon, id.* at 763: "Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees." The basis for an assumption that prevention can be maximized by shifting the liability to one already liable, and only for a lesser amount, is doubtful.[8]

When Congress relieved the shipowner of the no-fault concept of seaworthiness, it preserved the liability for

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[8] For a detailed analysis, and a comprehensive collection of cases and authoritative treatises and articles dealing with this question, *see* Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. Chi. L. Rev. 661 (1973). The article states:

> "Nothing in economic theory or practical experience leads to the conclusion that either employers as a class or independent contractors as a class are in all cases better able to distribute the costs of risk." *Id.* at 672.

Removing the incentive upon the shipowner to prevent injuries does not increase the incentive of the employer who is liable whether negligent or not. While both employ subordinates to work for them, it seems obvious that a shipowner, as an entrepreneur is in a better position to distribute the loss than a stevedore, whose business is to furnish only a relatively small proportion of the total amount of services which the shipowner provides to shippers.

negligence, explaining, H.R. Rep. No. 92-1441, *supra,* at 4073, "This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits." And, the House Report also noted, *id.* at 4704, "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

Furthermore, Congress also expressly refused to treat vessels as joint employers of longshoremen:

> "This would result in restricting the vessel's liability in all cases to compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." *Id.* at 4702.

It could not be clearer that Congress intended shipowners to be liable for their own negligence.

Defendant contends that it cannot be held liable for negligence toward plaintiff because it was entitled to rely on the stevedore's primary duty to alleviate any condition dangerous to its employees. One difficulty with this argument is that the right to rely is based on an agreement between the shipowner and the stevedore. Rules regulating the conduct of persons toward others must be distinguished from agreements governing organization of the work.

The particular ingredient of the independent contractor relationship from which the defendant seeks to forge a shield against liability for its own negligence is said to be the independent contractor's control over the work and the place where the work is done. It is self-evident that if the shipowner relinquishes control of an unsafe place to work to the sole control of the stevedore, that relinquishment comes about because of an agreement it makes with the stevedore.[9] The parties may be careful in drawing their contract to provide an appearance of independence or control of the area where the work is to be done. But to enable a shipowner to escape liability by entering an agreement with the stevedore would contravene Congress' intention.

The 1972 amendments did not modify § 905(a) by which Congress had explicitly made the employers absolutely

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[9] In this case neither the scope of the work to be done by the stevedore, nor the extent of its control over the place where it was to be done, were established. There is nothing in the record to establish that the defendant's right as operating owner to control the ship, including the No. 4 hold, at the time the plaintiff was injured was in any way curtailed. *Cf. Hawn* v. *Pope & Talbot, Inc.*, 198 F.2d 800, 803 (3d Cir. 1952), *aff'd*, 346 U.S. 406 (1953). Nor is there anything in the record to establish that the scope of the work contracted for with the stevedore included the duty to pick up the bolts and replace them in the broken kegs and recooper the kegs. Whose duty it was to clean up "the mess" is disputed. Although the plaintiff reported the condition he did not refuse to continue to work at unloading the cargo. In a similar situation a Court of Appeals held that a judge's finding that the plaintiff was 75 percent contributorily negligent had to be modified because the evidence would not support a conclusion that the plaintiff was more than 50 percent at fault. *Mazzanti* v. *Lykes Bros. Steamship Co.*, 524 F.2d 961 (5th Cir. 1975).

liable for compensation "exclusive and in place of all other liability . . . to the employee." *See Louviere* v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975), *cert. denied sub nom. American Marine Corp.* v. *Louviere*, 423 U.S. 1078 (1976). Section 905(b) provides from the other side that in the case of injury to a covered employee, "the employer shall not be liable to the vessel for such damages directly or indirectly and *any agreements or warranties to the contrary shall be void.*" (Emphasis added)

The intent of Congress in outlawing such agreements is spelled out in H.R. Rep. No. 92-1441, *supra*, at 4704-05:

> "Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act [33 U.S.C. § 905] by requiring indemnification from a covered employer for employee injuries.
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> "Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to *prohibit such recovery under any theory including, without limitation, theories based on contract or tort.*[10]
>
> "Under the proposed amendments the vessel may not *by contractual agreement or otherwise* require the employer to indemnify it, in whole or in part, for such damages." (Emphasis added)

[10] For a thorough and perceptive analysis of the differences between tort-based and contract-based indemnity such as we have become accustomed to expect from Judge Friendly, see *Zapico* v. *Bucyrus-Erie Co.*, No. 77-7533 (2d Cir. June 15, 1978).

In *Zapico* v. *Bucyrus-Erie Co.*, No. 77-7533, slip op. at 3486 (2d Cir. June 15, 1978), Judge Friendly observed that the legislative history "does indicate that § 905 was meant to prevent *Ryan* indemnity actions by vessels. . . ." And he stated, *id.*: "The shipowners got a *quid pro quo* for the loss of their indemnity rights." The *quid pro quo* was the mitigation of the harsh no-fault doctrine of seaworthiness. *See S.S. Seatrain Louisiana* v. *California Stevedore & Ballast Co.*, 424 F. Supp. 180, 182-83 (N.D. Cal. 1976). Indeed, the House Report states, H.R. Rep. No. 92-1441, *supra*, at 4704: "The Committee also believes that the doctrine of the *Ryan* case . . . is no longer appropriate. . . ."

To permit a shipowner to negotiate with the stevedore by "contractual agreement or otherwise" for cargo removal operations so as to relieve it of liability to the longshoreman for damages caused by its own negligence, on the ground that the shipowner had a right to rely on the stevedore to remove the cause, would be to restore the kind of right to indemnity which § 905(b) eliminates. It seems to us that on any fair assessment of the legislative scheme in § 905(b) the implication of a right of exoneration in the shipowner from an employer based on the "independent contractor" relationship would be alien to Congress' intention. The rule regarding indemnity agreements, while not directly applicable to the question of whether the shipowner can be found negligent, is a crucial part of the legislative scheme. To maintain the integrity of that scheme, we should not adopt a rule as to negligence that is so inconsistent with the indemnity prohibition as to undermine a principle which Congress has established as fundamental. As stated in an analogous context in *Laird*

v. *Nelms*, 406 U.S. 797, 802 (1972): "To permit [defendant] to proceed on [an independent contractor] theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result." There is no warrant for a contention that a right of indemnity arising out of the relationship between an employer and its independent contractor is intrinsically immutable. Congress has excised that incident of the relationship "as a matter of public policy" in cases covered by § 905(b).

As an abstract matter an argument can be made that after turning over a job of work to be done aboard its ship to a stevedore a shipowner ought not to be liable for damages suffered by a longshoreman for pre-existing dangerous conditions it has created, or negligently failed to correct. The argument advanced in some of the cases, as noted in the dissenting opinion in *Canizzo, supra,* is that when dangerous working conditions arise the shipowner may justifiably rely on the independent contractors to "take care of the problem as they were bound to do." *Id.*, slip op. at 3216.[11] Even if it might be said that there can be such a duty to the shipowner, despite an express redaction in § 905(b) of any remedy for its breach, that would not relieve the ship of its own duty to exercise reasonable care. But a provision in a law which has been enacted by

[11] Statements in some of the cases to the effect that "[t]he shipowner had no duty to supervise the minute details of work totally entrusted to the competence of the stevedore," as in *Munoz, supra,* 553 F.2d at 840, and in *Ruffino, supra,* 559 F.2d at 863, when read in context, are relevant only to whether a shipowner had notice of a claimed defect. They do not address the problem in this case.

Congress must be distinguished from one which might have been but was not. Our concern is not to assess the fairness of a legislative scheme. Even if we were permitted to do so, we could not say that there is no rational, fair basis for holding a shipowner liable for its own negligence, instead of singling out the stevedore who did not create the risk, to be solely responsible.

Whether due care has been exercised in any negligence case depends on what care has been taken—not on who has been hired to take it. Since the work was permitted to go forward under conditions of danger known both to the ship and to the stevedore, the rule of § 343A(1) should have been applied by the jury to the facts of the case as they might find them to be in order to determine whether the defendant is liable for damages. "Should the jury be persuaded . . . and find that the shipowner was negligent in not correcting the open and obvious danger but that the plaintiff was contributorily negligent, it would apply the doctrine of comparative negligence to reduce the shipowner's liability proportionately." *Napoli, supra,* 536 F.2d at 509.

The ruling of the court below took from the jury both the issue of the defendant's responsibility for the unsafe condition of the place where the plaintiff was required to work, and the issue of to what degree, if any, his own conduct in the face of the known danger should reduce his recovery. As we have indicated above, both issues should have been left to the jury. Accordingly, we reverse and remand for further proceedings not inconsistent herewith.

Opinion of Unites States Court of Appeals for the Second Circuit Re: *Carlos Espinoza* v. *United States Lines, Inc.*

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of August one thousand nine hundred and seventy-eight.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.
HONORABLE J. EDWARD LUMBARD
HONORABLE WILLIAM H. MULLIGAN,
Circuit Judges.

78-7063

CARLOS ESPINOZA,
Plaintiff-Appellant,

v.

UNITED STATES LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 901 *et seq.*, an injured longshoreman can recover from the shipowner "only . . . for injuries proximately caused by the shipowner's negligence." *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 839 (2d Cir. 1977). Here, the shipowner's failure to inspect containers as they were hoisted aboard is asserted to be negligent.

As in *Munoz*, to accept this contention would be to nullify the intent of the 1972 Amendments. The shipowner "cannot be held liable for a dangerous condition created by an independent stevedore unless he has actual or constructive knowledge that the condition exists." *Ruffino* v. *Scindia Steam Navigation Co., Ltd.*, 559 F.2d 861, 863 (2d Cir. 1977). Since the alleged dangerous condition, which the plaintiff himself had not observed, was clearly not "open and obvious", *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505, 508 (2d Cir. 1976), constructive knowledge cannot be charged against the shipowner, and the judgment is accordingly affirmed.

IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge.

J. EDWARD LUMBARD
J. EDWARD LUMBARD

WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN,
Circuit Judges.

Supreme Court, U. S.
FILED
OCT 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-358

FARRELL LINES INCORPORATED,

Petitioner,

—against—

ANTHONY CANIZZO, UNIVERSAL TERMINAL AND STEVEDORING CORP., and FRANK J. HOLLERAN, INC.,

Respondents.

BRIEF OF RESPONDENT, FRANK J. HOLLERAN INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF OF RESPONDENT, FRANK J. HOLLERAN INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The opinion of the United States Court of Appeals, dated June 2, 1978, has been set forth in petitioner's brief.

Statutes Involved

The petitioner has set forth Sections 905(b), 941(a) of the Longshoremen and Harbor Workers Compensation Act, Title 33 U.S.C. 901 et seq. In addition, he has also cited 29 C.F.R. 1918.19(c).

POINT I

The decision below does not conflict with the decision in the *Cox* case.

The *Canizzo* opinion can readily be distinguished from the *Cox* decision which has now been officially reported *Cox* v. *Flota Mercante Grancolombiana, S.A.*, 577 F. 2d 798 (1978). The control of the area where Cox worked was wholly under his employer's care. Canizzo, however, was injured when he was using a walkway or alleyway which was used not only by himself and his co-workers, but also other people working on the vessel.

At page 802 in the *Cox* case the Court stated, "In either case, the situation was known to the stevedore. The stevedore from its inception had complete control of the unloading operation."

Then later on, on the same page, the Court held, "It was the stevedore which had exclusive control of the gangs and how, when and where they worked."

There is nothing in the *Canizzo* case which bears out any contention that Canizzo's employer had direct knowledge of the existence of the hazard over which Canizzo fell and, in fact, the District Court found the vessel negligent in not removing the open and obvious condition which caused the injury to Canizzo.

On page 8a of the petition, the Circuit Court states, "The existence of a substantial area of grease in a narrow passageway, which should have been known to the ship's personnel, made more dangerous by the positioning by the ship's personnel of the cluster lights and wires upon the greasy areas supports the finding of negligence on the part of the ship and justifies the plaintiff's judgment even under the new dispensation.

In the reading of the opinion of the Court of Appeals as well as the District Court, it is quite clear there was a finding of negligence on the part of the vessel and the District Court found, "No negligence by Holleran's lashers was shown." (p. 28a).

POINT II

Section 905(b) of the Longshoremen and Harbor Workers Act clearly bears a claim for indemnity or contribution by the ship against the plaintiff's employer.

In amending the Longshoremen and Harbor Workers Compensation Act, the Congress has set forth in the legislative history contained in 1972 U.S. Code Congressional and Administrative News, page 4699 et seq. intended to shield the employer from indemnity claims by the ship owner as the employer or stevedore had agreed to increase the Workers Compensation Benefits.

The Statute makes no distinction between the various services supplied by the employer as contended by the ship's counsel on page 6 of the petition.

There is no case cited from either the District Court or any of the Circuit Courts which would substantiate the ship's attorney's interpretation of the Statute as set forth on page 6 of the petition.

CONCLUSION

It is respectfully submitted that the petitioner has failed to sustain the burden required to invoke the Court's jurisdiction pursuant to Supreme Court Rule 19, and the petition for a Writ of Certiorari should be denied in all respects.

Respectfully submitted,

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